

Friday  
August 1, 1986

# Estuaries



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Proclamation 5514 of July 29, 1986

The President

## National Nuclear Medicine Week, 1986

By the President of the United States of America

### A Proclamation

Nuclear medicine is an invaluable medical resource that contributes significantly to improvements in the diagnosis and treatment of patients in the United States. It also provides powerful tools for biomedical research.

Today, nuclear medicine allows physicians to probe the bodies of patients without using a scalpel. Three-dimensional images of organs such as the heart and kidneys can be obtained, leading to early diagnosis of disease.

In addition to images of anatomy, nuclear medicine yields information on subtle chemical processes as they occur in the body. For example, investigators can now examine the brain's processing of glucose, which it uses as a source of energy. Due to advances in nuclear medicine, the underlying pathological changes in such illnesses as Alzheimer's disease and schizophrenia are now closer to being understood.

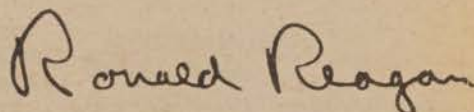
The field is growing so fast that what today seems a breakthrough will tomorrow be routine. Powerful tools such as positron emission tomography, or PET, are being brought to bear on heart disease and cancer. Where nuclear medicine techniques were once used to provide images of tumors, the tumors themselves may now be located and treated using specially targeted isotopes linked to antibodies specific to the tumor.

All across the country, from medical centers to community hospitals, nuclear medicine departments are becoming as common as x-ray laboratories. This field unites the skills of medicine, physics, chemistry, and mathematics in a common focus—healing the sick.

To stimulate public awareness of a medical field that has come of age, the Congress, by House Joint Resolution 297, has designated the week beginning July 27, 1986, as "National Nuclear Medicine Week" and authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the week beginning July 27, 1986, as National Nuclear Medicine Week, and I call upon the people of the United States to observe this week with appropriate observances and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of July, in the year of our Lord nineteen hundred and eighty-six, and of the Independence of the United States of America the two hundred and eleventh.







# Rules and Regulations

Federal Register

Vol. 51, No. 148

Friday, August 1, 1986

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 911

#### Limes Grown in Florida; Amendment to Container Regulation

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule will permit lime handlers to make export shipments in 2.5 kilogram containers and eliminate five containers no longer used by the industry. The addition of the 2.5 kilogram container will allow U.S. shippers to compete more favorably in certain European markets. Elimination of the five containers currently authorized but no longer used will bring the container requirements into conformity with current handler packing practices.

**EFFECTIVE DATE:** August 1, 1986.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, DC 20250, telephone (202) 447-5697.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Departmental Regulation 1512-1 and Executive Order 12291 and has been designated a "non-major" rule.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules proposed thereunder, are unique in that they are brought about through the group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

The container requirement changes are pursuant to the marketing agreement and Marketing Order No. 911 regulating the handling of limes grown in Florida. The program is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). The Lime Administrative Committee, established under the program, is responsible for its local administration.

Notice was given in the April 23, 1986, Federal Register (51 FR 15349) affording interested persons until May 23, 1986, to submit written comments. None were filed. However, at its May 14 meeting the committee recommended a slight change in the dimensions of the 2.5 kilogram container inasmuch as the die to be used varies slightly from the one used for the original measurements, which were 7½ by 12 by 4½ inches. The new measurements are 7½ by 11¾ by 4¼ inches. The recommendation is found to have merit and is hereby incorporated into this rule.

At its public meeting on February 12, 1986, the committee recommended adding a new container to be used for export shipments. The new container will have inside dimensions of 7½ by 11¾ by 4¼ inches and contains 2.5 kilograms (approximately 5.5 pounds) of limes. Foreign shippers, notably those from Brazil, tend to adjust container sizes as the market price of limes changes. This can place U.S. shippers at a competitive disadvantage if they cannot use a container similar to those used by other shippers. The addition of the 2.5 kilogram container will make it easier for U.S. exporters to compete in certain European markets with shippers from other lime producing areas using the 2.5 kilogram container.

The committee also recommended eliminating five containers from the container regulation. These containers are of larger capacity, ranging from 38 to 42 pounds and 20 to 22 pounds of limes. The industry has been moving toward smaller containers over the years, and the ones to be eliminated are no longer used. The change will lessen the number

of large containers authorized and bring the container requirements into conformity with industry operating practices.

It is hereby found and determined that the following amendment, as hereinafter set forth, will tend to effectuate the declared policy of the Act. It is further found that good cause exists for not postponing the effective date of this amendment until 30 days after publication in the Federal Register (5 U.S.C. 553) in that the shipping season already began in March and to maximize benefits to producers this regulation should apply to as many shipments as possible. Compliance with this amendment will not require any special preparation on the part of persons subject thereto which cannot be completed by the effective date.

#### List of Subjects in 7 CFR Part 911

Marketing agreements and orders, Limes, Florida.

#### PART 911—LIMES GROWN IN FLORIDA

1. The authority citation for 7 CFR Part 911 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 911.329 (47 FR 22073, May 21, 1982; 47 FR 29647, July 8, 1982; and 47 FR 45865, October 14, 1982) is hereby amended by removing (a)(2)(i) through (a)(2)(v), adding a new (a)(2)(i), and redesignating (a)(2)(vi) through (a)(2)(xii) as (a)(2)(ii) through (a)(2)(viii), respectively, as follows:

#### § 911.329 Lime Regulation 27.

(a) \* \* \*

(2) \* \* \*

(i) Containers with inside dimensions of 7½ by 11¾ by 4¼ inches; except that any such container shall contain not less than 5 nor more than 6 pounds net weight of limes.

\* \* \* \* \*

Dated: July 25, 1986.

Joseph A. Gribbin,

Director, Fruit and Vegetable Division,  
Agricultural Marketing Service.

[FR Doc. 86-17264 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-02-M



**7 CFR Part 918****[Georgia Peach Reg. 3; Amdt. 3]****Fresh Peaches Grown in Georgia;  
Change in Quality Requirements for  
1986 and Subsequent Seasons****AGENCY:** Agricultural Marketing Service,  
USDA.**ACTION:** Finalization of interim final rule.

**SUMMARY:** The Department has decided to leave in effect the interim final rule which added a tolerance for decay to the maturity, size, and inspection requirements in effect for Georgia peaches. This action is intended to insure that only good quality peaches will be available for fresh market shipment during the remainder of the 1986 season and subsequent seasons. This action is in the interest of producers and consumers.

**EFFECTIVE DATE:** August 1, 1986.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Washington, D.C. 20250. Telephone: (202) 447-5697.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Departmental Regulation 1521-1 and Executive Order 12291 and has been designated a "non-major" rule.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such action in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities on their own behalf. Thus, both statutes have small entity orientation and compatibility.

This action finalizes the interim final rule which was recommended by the Georgia Peach Industry Committee and which amended Georgia Peach Regulation 3 to include a one percent tolerance for decay. In making its recommendation, the committee considered supply and market conditions and other factors affecting the need for and type of regulations suitable for the 1986 Georgia Peach crop. On the basis of these considerations, the committee recommended the addition of a one percent tolerance for decay to the

maturity, size, and inspection requirements. Finalization of these requirements will insure that only good quality peaches will be available for fresh market shipment during the remainder of the 1986 and subsequent seasons. This will benefit both producers and consumers by preventing the shipment of undesirable and unwholesome peaches. The shipment of such fruit tends to adversely affect consumer demand and depress grower returns.

The interim final rule was issued on May 1, 1986, and published in the *Federal Register* on May 7, 1986, (51 FR 16812). Interested persons were given until June 6, 1986, to submit comments. No comments were received.

The interim final rule and this action are issued under the marketing agreement and Order No. 918, both as amended (7 CFR Part 918), regulating the handling of peaches grown in Georgia. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). Like the interim final rule, this rule is based on a recommendation and information submitted by the Georgia Peach Industry Committee. That committee, established under the marketing agreement and order, works with the Department in administering the program. This rule contains requirements identical to those in the interim final rule in effect since May 1, 1986.

Prior to May 1, 1986, shipments of Georgia peaches, except peaches in bulk to adjacent markets (the States of Florida, Alabama, Tennessee, North Carolina, South Carolina, Mississippi, and that portion of Louisiana which is east of the Mississippi River) were required to be mature as provided in § 918.400, and not be smaller than 1½ inches in diameter, except that not more than 10 percent, by count, of such peaches in any lot, and not more than 15 percent, by count, of such peaches in any container in such lot may be smaller than 1½ inches in diameter. The interim final rule issued on May 1, 1986, added a one percent tolerance for decay to those requirements. To insure that all peaches entering market channels meet those requirements, the peaches must be inspected and certified as meeting the requirements prior to shipment.

After consideration of all relevant matter presented, the information and recommendation submitted by the committee, and other available information, it is found that finalization of Peach Regulation 3, Amendment 3, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that it is impracticable and contrary to the public interest to postpone the effective date of this action until 30 days after publication in the *Federal Register* (5 U.S.C. 553), because: (1) The requirements finalized by this action are identical to those effective since May 1, 1986 (51 FR 16812), the date when the shipment of 1986 crop Georgia peaches began; (2) producers and handlers have been conducting their operations on the basis of those requirements since that date, and need no additional time to comply therewith; and (3) no useful purpose would be served by delaying the effective date of this action.

**List of Subjects in 7 CFR Part 918**Marketing agreements and orders.  
Peaches, Georgia.**PART 918—[AMENDED]**

1. The authority citation for 7 CFR Part 918 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; U.S.C. 601-674.

The interim rule published in the *Federal Register* of May 1, 1986 (51 FR 16812) is adopted as final without change.

Joseph A. Gribbin,

*Director, Fruit and Vegetable Division,  
Agricultural Marketing Service.*

[FR Doc. 86-17263 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-02-M

**FEDERAL RESERVE SYSTEM****12 CFR Parts 207, 220, 221, and 224****[Regulations G, T, U, and X]****Securities Credit Transactions****AGENCY:** Board of Governors of the  
Federal Reserve System.**ACTION:** Final rule.

**SUMMARY:** The List of Marginable OTC Stocks is comprised of stocks traded over-the-counter (OTC) that have been determined by the Board of Governors of the Federal Reserve System to be subject to the margin requirements under certain Federal Reserve regulations. The List is published from time to time by the Board as a guide for lenders subject to the regulations and the general public. This document sets forth additions to or deletions from the previously published List effective May 13, 1986 and will serve to give notice to the public about the changed status of certain stocks.

**EFFECTIVE DATE:** August 12, 1986.



**FOR FURTHER INFORMATION CONTACT:**

Peggy Wolfrum, Research Assistant, Division of Banking Supervision and Regulation, (202) 452-2781, Earnestine Hill or Dorothea Thompson, Telecommunications Device for the Deaf (TDD) (202) 452-3544, Board of Governors of the Federal Reserve System, Washington, DC 20551.

**SUPPLEMENTARY INFORMATION:** Set forth below are stocks representing additions to or deletions from the Board's List of Marginable OTC Stocks. This List supersedes the last complete List which was effective May 13, 1986 (51 FR 15757, April 28, 1986). The List includes those stocks that the Board of Governors has found meet the criteria specified by the Board and thus have the degree of national investor interest, the depth and breadth of market, and the availability of information respecting the stock and its issuer to warrant incorporating such stocks within the requirements of Regulations G, T, U and X (12 CFR 207, 220, 221, and 224, respectively). It also includes, as a result of an amendment to the margin regulations (49 FR 35756, September 12, 1984), any stock designated under an SEC rule as qualified for trading in a national market system (NMS Security). The List of Marginable OTC Stocks, as it is now called, is a composite of the List of OTC Margin Stocks and all NMS securities. Additional OTC securities may be designated as NMS securities in the interim between the Board's quarterly publications. They will become automatically marginable at broker-dealers upon the effective date of their designation. The names of these securities are available at the Board and the Securities and Exchange Commission and will be subsequently incorporated into the Board's next quarterly List. Copies of the current List may be obtained from any Federal Reserve Bank.

The requirements of 5 U.S.C. 553 with respect to notice and public participation were not followed in connection with the issuance of this amendment due to the objective character of the criteria for inclusion and continued inclusion on the List specified in 12 CFR 207.6 (a) and (b), 220.17 (a) and (b), and 221.7 (a) and (b). No additional useful information would be gained by public participation. The full requirements of 5 U.S.C. 553 with respect to deferred effective date have not been followed in connection with the issuance of this amendment because the Board finds that it is in the public interest to facilitate investment and credit decisions based in whole or in part upon the composition of this List as

soon as possible. The Board has responded to a request by the public and allowed a two-week delay before the List is effective.

**List of Subjects****12 CFR Part 207**

Banks, banking, Credit, Federal Reserve System, Margin, Margin requirements, National Market System (NMS Security), Reporting and recordkeeping requirements, Securities.

**12 CFR Part 220**

Banks, Banking, Brokers, Credit, Federal Reserve System, Margin, Margin requirements, Investments, National Market System (NMS Security), Reporting and recordkeeping requirements, Securities.

**12 CFR Part 221**

Banks, Banking, Credit, Federal Reserve System, Margin, Margin requirements, Securities, National Market System (NMS Security), Reporting and recordkeeping requirements.

**12 CFR Part 224**

Banks, Banking, Borrowers, Credit, Federal Reserve System, Margin, Margin requirements, Reporting and recordkeeping requirements, Securities.

Accordingly, pursuant to the authority of sections 7 and 23 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78g and 78w), and in accordance with section 207.2(k) and 6(c) of Regulation G, section 220.2(s) and 17(c) of Regulation T, and section 221.2(j) and 7(c) of Regulation U, there is set forth below a listing of deletions from and additions to the Board's List:

**Deletions From List****Stocks Removed for Failing Continued Listing Requirements**

Acro Energy Corporation  
No par common  
Amstar Corporation  
\$12.50 par cumulative preferred  
Applied Circuit Technology, Inc.  
No par common  
Argonaut Energy Corporation  
No par common  
Biosearch Medical Products Inc.  
No par common  
Callon Petroleum Company  
\$0.01 par common  
Carolina Mines Ltd.  
No par common  
Cityfed Financial Corporation  
\$2.20 par cumulative convertible preferred  
Commonwealth Realty Trust  
Class A, no par shares of beneficial interest  
Compusave Corporation  
\$0.01 par common  
Continental Health Affiliates, Inc.  
Warrants (expire 04-03-86)

Diplomat Electronics Corporation  
\$0.01 par common  
Expeditors International of Washington, Inc.  
Warrants (expire 09-17-89)  
First Executive Corporation  
Series D, \$1.00 par cumulative convertible preferred  
First Federal Savings & Loan Association of Roanoke  
\$0.01 par common  
First Midwest Corporation  
\$1.00 par common  
First National Corporation (Ohio)  
No par common  
General Devices, Inc.  
\$0.01 par common  
General Hydrocarbons, Inc.  
\$0.01 par common  
Hammer Technologies, Inc.  
\$0.001 par common  
Health Information Systems Inc.  
\$0.01 par common  
Indiana National Corporation  
No par depository preferred  
Integrated Barter International, Inc.  
\$0.40 par common  
Intercontinental Energy Corp.  
\$0.40 par common  
Lorimar Telepictures Corporation  
8 3/4% convertible subordinated debentures  
Mr. Steak, Inc.  
No par common  
Moduline International, Inc.  
No par common  
Morris County Savings Bank (New Jersey)  
\$2.00 par common  
ORS Automation Inc.  
\$0.01 par common  
Offshore Logistics, Inc.  
Series A, no par convertible preferred  
OMNI Equities, Inc.  
\$0.01 par common  
Pacific Gamble Robinson Company  
\$5.00 par common  
Satelco, Inc.  
\$0.10 par common  
Servamatic Systems, Inc.  
No par common  
Statewide Bancorp.  
Series A, \$2.20 cumulative convertible preferred  
Strata Corporation  
Class A, \$0.10 par common  
Summit Bancorporation, The  
Series A, \$2.20 convertible preferred  
Technical Equities Corporation  
\$1.00 par capital  
Thoratec Laboratories Corporation  
No par common  
Tidelands Tally Trust "B"  
Units of beneficial interest  
United States Mutual Financial Corporation  
\$1.00 par common  
Victoria Station Inc.  
\$0.10 par common  
Visual Technology, Inc.  
\$0.10 par common  
Voit Corporation  
\$0.005 par common  
Widcom Inc.  
\$0.01 par common



*Stocks Removed for Listing on a National Securities Exchange or Being Involved in an Acquisition*

A&M Food Services, Inc.  
\$.01 par common  
Alfin Fragrances, Inc.  
\$.01 par common  
American Cellular Telephone Corp.  
Class A, \$.01 par common  
American Technical Ceramics Corp.  
\$.01 par common  
Americare Health Corporation  
\$1.00 par common  
Booth, Inc.  
\$.50 par common  
Centrust Savings Bank (Florida)  
\$.01 par common  
Citizens Cable Communications, Inc.  
No par common  
Continental Healthcare Systems Inc.  
\$.01 par common  
Craddock-Terry Shoe Corporation  
\$1.00 par common  
Decision Data Computer Corporation  
\$.10 par common  
Emmett & Chandler Companies, Inc.  
\$.50 par common  
Environmental Systems Company  
\$.01 par common  
First Indiana Bancorp  
\$10.00 par common  
Georgia Federal Bank, FSB  
\$1.00 par common  
Highlands-National, Inc.  
\$1.00 par common  
Larsen Company, The  
\$.40 par common  
Lily-Tulip, Inc.  
\$.05 par common  
Lincoln Income Life Insurance Company  
\$1.00 par common  
Medicare, Inc.  
\$.01 par common  
Mediplex Group, Inc., The  
\$.10 par common  
Midwest Commerce Corporation  
No par common  
Mylan Laboratories Inc.  
\$.50 par common  
Numerax Inc.  
\$.01 par common  
Peerless Chain Company  
\$.25 par common  
Pharmacy Corporation of America, Inc.  
\$.01 par common  
Pittsburgh Brewing Company  
\$1.00 par common  
Provincetown-Boston Airline, Inc.  
\$.01 par common  
RJ Financial Corporation  
\$.01 par common  
Reid-Rowell, Inc.  
\$.20 par common  
Rival Manufacturing Company  
\$1.00 par common  
Rocky Mountain Natural Gas Company, Inc.  
\$3.00 par common  
Savings Bank of Puget Sound, FSB  
\$.50 par common  
Sloan Technology Corporation  
\$.10 par common  
Suburban Airlines, Inc.  
\$1.00 par common  
Tempo Enterprises, Inc.  
\$.01 par common  
Trans Louisiana Gas Company, Inc.

No par common  
Union Bancorp Inc. (Michigan)  
\$1.00 par common  
United Federal Bank, FSB (New Hampshire)  
\$1.00 par common  
Van Schaack & Company  
\$1.00 par common

**Additions to the List**

ACA Joe Eastern, Ltd.  
\$.01 par common  
AEP Industries, Inc.  
\$.01 par common  
AIM Telephones, Inc.  
\$.01 par common  
AW Computer Systems, Inc.  
Class A, \$.01 par common  
Advanced Magnetics, Inc.  
\$.01 par common  
Allison's Place, Inc.  
\$.01 par common  
America First Federally Guaranteed  
Mortgage Fund 2 Limited Partnership  
Exchangeable Passthrough Certificates  
Exchangeable Units  
America First Tax Exempt Mortgage Fund  
Limited Partnership  
Beneficial Unit Certificates  
American Cruise Lines, Inc.  
\$.01 par common  
American Health Companies, Inc.  
\$.01 par common  
American Home Shield Corporation  
\$.04 par common  
American Travellers Corporation  
\$.01 par common  
Anchor Glass Container Corporation  
\$.01 par common  
Andover Togs, Inc.  
\$.10 par common  
Arbor Drugs, Inc.  
\$.01 par common  
Aspen Ribbons, Inc.  
No par common  
Astec Industries, Inc.  
\$.20 par common  
Atlantic Federal Savings Bank (Maryland)  
\$1.00 par common  
Baker, J., Inc.  
\$.50 par common  
Balchem Corporation  
Class B, \$.66% par common  
Baldwin & Lyons, Inc.  
Class B, no par common  
Bancserve Group, Inc.  
\$.50 par common  
Bay View Federal Savings & Loan  
Association (California)  
\$.01 par common  
Bayamon Federal Savings & Loan  
Association of Puerto Rico  
\$1.00 par common  
Beauticontrol Cosmetics, Inc.  
\$.10 par common  
Bio-Medicus, Inc.  
\$.01 par common  
Breakwater Resources, Ltd.  
No par common  
Brendle's Incorporated  
\$1.00 par common  
Brookfield Federal Bank for Savings (Illinois)  
\$1.00 par common  
Buehler International, Inc.  
\$.01 par common  
CCA Industries, Inc.  
\$.01 par common Warrants

CNL Financial Corporation  
\$1.00 par common  
Calumet Industries, Inc.  
Warrants (expire 02-27-87)  
Cambridge Bioscience Corporation  
\$.01 par common  
Capital Wire & Cable Corporation  
No par common  
Cayuga Savings Bank (New York)  
\$1.00 par common  
Centennial Real Estate Investment Trust  
No par shares of beneficial interest  
Central Holding Company  
No par common  
Charter-Crellin, Inc.  
\$.01 par common  
Chartwell Group Ltd.  
\$.01 par common  
Children's Discovery Centers of America, Inc.  
Class A, \$.01 par common  
Citizens Financial Corporation  
\$1.00 par common  
Community Bank System, Inc. (New York)  
\$1.25 par common  
Community Bankshares, Inc.  
\$1.00 par common  
Conversion Industries, Inc.  
No par common  
Cosmetics and Fragrance Concepts, Inc.  
\$.01 par common  
Cronus Industries, Inc.  
Warrants (expire 02-01-90)  
Crossland Savings, F.S.B. (New York)  
Series A, \$1.8125 par cumulative  
convertible preferred  
Cypress Semiconductor Corporation  
No par common  
Digitech, Inc.  
\$.10 par common  
Doxsee Food Corporation  
\$.10 par common  
Eldec Corporation  
\$.05 par common  
Energy Factors, Incorporated  
8 1/4% convertible subordinated debentures  
Enseco Incorporated  
\$.01 par common  
Entertainment Marketing, Incorporated  
\$.01 par common  
Escalade, Incorporated  
\$1.00 par common  
FFB Corp.  
\$1.00 par common  
Faradyne Electronics Corp.  
\$.05 par common  
First American Savings, F.A. (Pennsylvania)  
\$1.00 par common  
First Community Bancorp, Inc.  
\$10.00 par common  
First Federal of the Carolinas, F.A.  
\$1.00 par convertible preferred  
First Oak Brook Bancshares, Inc. (Illinois)  
Class A, \$2.00 par common  
Firstbank of Illinois Co.  
\$2.00 par common  
Florida Employers Insurance Company, The  
\$.01 par common  
Frankford Corporation, The  
\$1.00 par common  
Fretter, Inc.  
\$.01 par common  
Gander Mountain, Inc.  
\$.01 par common  
Gantos, Inc.  
\$.01 par common



Gardenamerica Corporation No par common	Lincoln Foodserve Products, Inc. No par common	Savoy Industries, Inc. \$.01 par common
Gateway Communications, Inc. No par common	MacMillan Bloedel Limited No par common	Shoe City Corporation \$.10 par common
Gemcraft, Inc. \$.10 par common	Management Assistance Inc. Liquidating Trust	Silver Hart Mines, Ltd. No par common
General Computer Corporation \$.10 par common	Units of beneficial interest	Skaneateles Savings Bank (New York) \$1.00 par common
Genetics Institute, Inc. \$.01 par common	Marietta Corporation \$.01 par common	Skywest, Inc. No par common
Genicom Corporation \$.01 par common	Medford Savings Bank (Massachusetts) \$.01 par common	Sooner Defense of Florida, Inc. \$.01 par common
Genmar Industries, Inc. \$.01 par common	Memory Metals, Inc. \$.01 par common	South Carolina Federal Savings Bank \$1.00 par common
Genzyme Corporation \$.01 par common	Mid-Hudson Savings Bank, FSB (New York) \$1.00 par common	Southeastern Savings & Loan Company (North Carolina) \$1.00 par common
Golden Knight Resources Inc. No par common	Midway Airlines, Inc. Series B, convertible exchangeable preferred	Southington Savings Bank (Connecticut) \$1.00 par common
Great American Recreation, Inc. \$.01 par common	Modular Technology, Inc. \$.01 par common	Southwest Airlines Co. Warrants (expire 06-25-90)
Grenada Sunburst System Corporation \$.25 par common	Moore-Handley, Inc. \$.10 par common	Spartech Corporation \$.50 par common
HPSC, Inc. Warrants (expire 01-15-89)	Neoax, Inc. \$.05 par common	Stater Bros. Inc. \$.01 par common
Haverty Furniture Companies, Inc. Class A, \$.10 par common	Neti Technologies Inc. No par common	Statewide Bancorp Warrants (expire 03-31-89)
Henley Group, Inc., The \$.01 par common	New Milford Savings Bank (Connecticut) \$1.00 par common	Sterling, Inc. No par common
Home Federal Savings Bank (Maryland) \$1.00 par common	Newport News Savings and Loan Association \$1.00 par common	Summit Savings Association (Washington) \$.80 par common
Home Savings & Loan Association, Inc. (North Carolina) \$1.00 par common	Niagara Exchange Corporation \$1.00 par common	Sunstates Corporation \$.25 par common preferred
Immucor, Inc. \$.10 par common	North American Communications Corporation \$.01 par common	Sybra, Inc. \$.10 par common
Independent Bank Corporation \$1.00 par common	North American Savings Association (Missouri) \$1.00 par common	Synercom Technology, Inc. \$.03 par common
Infinity Broadcasting Corporation Class A, \$.01 par common	Nova Pharmaceutical Corporation Class B, warrants, (expire 08-05-88)	TCF Banking and Savings, F.A. (Minnesota) \$.01 par common
Integrated Resources American Insured Mortgage Investors Series '85, a California Limited Partnership Depository Units	P&F Industries, Inc. \$.20 par common Warrants (expire 05-18- 87)	TMK/United, Inc. \$1.00 par common
Interleaf, Inc. \$.01 par common	Pacific Nuclear Systems, Inc. \$.01 par common	Tech Data Corporation \$.0015 par common
International Robomation Intelligence No par common	Peoples Westchester Savings Bank (New York) \$1.00 par common	Teknowledge Inc. \$.01 par common
ITO-Yokado Co., Ltd. American Depository Receipts	Piedmont Federal Savings Bank (Virginia) \$1.00 par common	Telequest, Inc. No par common
JG Industries, Inc. No par common	Pioneer Savings Bank, Inc. (North Carolina) \$1.00 par common	Telos Corporation \$.01 par common
J&J Snack Food Corporation No par common	Polk Audio, Inc. \$.01 par common	Thermo Analytical, Inc. \$.10 par common
Jefferson National Bank (New York) \$1.00 par common	Poly-Tech, Inc. No par common	Tompkins County Trust Company (New York) \$.50 par common
KLLM Transport Services, Inc. \$1.00 par common	Ports of Call, Inc. \$.20 par common	Tower Federal Savings Bank (Indiana) \$.01 par common
Kahler Corporation, The \$.25 par common	Pre-Paid Legal Services, Inc. Warrants (expire 11-30-87)	Town & Country Jewelry Manufacturing Corporation \$.01 par common
Kenilworth Systems Corporation \$.01 par common	Prospect Group, Inc., The \$.50 par common	Traditional Industries, Inc. \$.20 par common
Kent Electronics Corporation No par common	Pyramid Technology Corporation No par common	Trenwick Group, Inc. No par common
Key Centurion Bancshares, Inc. \$.30 par common	Reidel Environmental Technologies, Inc. \$.01 par common	Tri-Star Pictures, Inc. Warrants (expire 06-01-92)
Kirschner Medical Corporation \$.10 par common	Repligen Corporation \$.01 par common	Tyco Toys, Inc. \$.01 par common
Kurzweil Music Systems, Inc. \$.001 par common	Richmond Hills Savings Bank \$1.00 par common	United Dominion Realty Trust, Inc. 9% convertible subordinated debentures
Lake Sunapee Savings Bank, F.S.B. (New Hampshire) \$1.00 par common	Rochester Community Savings Bank, The \$1.00 par common	United Insurance Companies, Inc. \$.01 par common
Laser Precision Corporation \$.10 par common	Rudy's Restaurant Group, Inc. \$.01 par common	United Savings and Loan Association (Missouri) \$1.00 par common
Leisure Concepts, Inc. \$.01 par common	Ryan, Beck & Co., Inc. \$.10 par common	Universal Voltronics Corporation



\$0.05 par common  
 Vanguard Savings Bank (Massachusetts)  
 \$0.10 par common  
 Waste Technology Corp.  
 \$0.01 par common  
 Waterford Glass Group, PLC.  
 No par common  
 Webster Clothes, Inc.  
 \$0.01 par common  
 Werner Enterprises, Inc.  
 \$0.01 par common  
 Western Bank (Oregon)  
 \$2.50 par common  
 Western Publishing Group, Inc.  
 \$0.01 par common  
 Worlds of Wonder, Inc.  
 No par common  
 Xoma Corporation  
 \$0.0005 par common  
 Xidex Corporation  
 Warrants (expire 04-16-93)  
 Xyvision, Inc.  
 \$0.03 par common

By order of the Board of Governors of the Federal Reserve System acting by its Director of the Division of Banking Supervision and Regulation pursuant to delegated authority (12 CFR 265.2(c)(18)), July 28, 1986.

William W. Wiles,  
 Secretary of the Board.

[FR Doc. 86-14179 Filed 7-31-86; 8:45 am]

BILLING CODE 6210-01-M

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 741

#### Requirements for Insurance and Voluntary Termination or Conversion of Insurance

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** This final rule changes the definition of "Insurance Year," presently January 1 through December 31, to mean the period from July 1 through June 30. Payments due to the National Credit Union Share Insurance Fund are determined based upon insured shares at the close of the Insurance Year. These payments will continue to be due by the end of January but will now be based upon insured share balances reported by credit unions on their Midyear Call Report.

**EFFECTIVE DATE:** August 1, 1986.

**ADDRESS:** National Credit Union Administration, 1776 G Street, NW, Washington, DC 20456.

**FOR FURTHER INFORMATION CONTACT:** D. Michael Riley, Director, Office of Examination and Insurance (202) 357-1065.

**SUPPLEMENTARY INFORMATION:**

## Background

The Federal Credit Union Act, at section 202(b)(1) (12 U.S.C. 1782(b)(1)), provides that for each Insurance Year an insured credit union must file a certified statement showing the total amount of insured shares at the close of the preceding Insurance Year. The amount of such shares is used to determine the credit union's capitalization deposit, or adjustments thereto, and insurance premiums, if any. Section 202(h)(1) (12 U.S.C. 1782(h)(1)) defines "insurance year" to mean January 1 through December 31 but permits the NCUA Board to prescribe any other period of time.

At its April 25, 1986, meeting, the NCUA Board issued for public comment a notice of proposed rulemaking affecting three regulations relating to share insurance: Part 740—Advertising; Part 741—Requirements for Insurance; and Part 745—Clarification and Definition of Account Insurance Coverage. (51 FR 16710.) Included within that notice was the proposal to amend § 741.7(b)(1) to change the definition of "Insurance Year" from "January 1 through December 31" to "July 1 through June 30."

Six commenters addressed this issue in their response to the request for public comment. Five of the commenters had no objection to the proposal, although several conditioned their response, e.g., as long as it would reduce administrative costs, or didn't result in a double insurance premium or payment. The sixth commenter objected because the change would delay the capitalization deposit from newly-chartered credit unions. Any delay, however, would be immaterial because the insured share balance of a newly-chartered credit union is minimal.

During 1985 and 1986, NCUA Regional and Washington Office staff spent considerable time and effort resolving capitalization deposit discrepancies which occurred from incorrect share balances reported by credit unions on their annual assessment forms. Although the deposit adjustments are due to the NCUSIF by late January, past experience has shown that an additional two or more months are required by Agency staff to determine correct share balances, issue refunds or collect underpayments, and correct the credit union's capitalization data. In March 1986, 840 credit unions still had unresolved differences in reported shares between the Share Insurance Invoice and Yearend Call Report. The net amount of share difference between the two forms was approximately \$1 billion. One percent of this amount is

\$10 million which has sufficient impact upon the Fund's contributed capital balance. Most of these errors have now been resolved, but to prevent this situation from recurring in future years, it was proposed that the Insurance Year be changed from January 1 through December 31 to a period extending from July 1 through June 30. This would enable NCUA to preprint the entire Share Insurance Invoice by using the insured share balances reported by credit unions on their Midyear Call Report. The capitalization deposit due would be calculated by the computer thus eliminating a high potential for manual error by credit unions. Another advantage of amending the Insurance Year is that it would provide the NCUSIF advance knowledge of the precise dollar amount of deposits due in January and enhance the budget process through more accurate income and retained earnings projections. No change would be required for the collection of monies. The invoices would be preprinted and mailed to credit unions by January 1st of each year, and payments would continue to be due by the end of January. A similar change was made for the operating fee in November 1984. At that time, the Board approved a change in the operating fee assessment using reported assets from the credit unions' June 30 Midyear Call Report as opposed to the December 31 Yearend Call Report. Since then, the entire operating fee invoice has been preprinted and collection of the fees has been relatively error free.

Therefore, the Board has amended the definition of "Insurance Year" as previously proposed.

#### Impact Upon NCUSIF

Under the new Insurance Year proposal, all credit unions would still receive a dividend for a twelve-month period and the amount of dividend paid would not differ significantly from that paid before the Insurance Year change. In either case, the projected dividend is less than 1%.

#### Impact Upon Credit Unions

The change in Insurance Year would benefit credit unions through a reduction of capitalization payments in January 1987. Using the projected \$121 billion in insured shares as of June 30, 1986, the amount due from credit unions would be about \$100 million less than the amount due using December 31, 1986, insured shares (assuming 19% growth rate).

#### Regulatory Procedures

The NCUA Board has determined and certifies that the amended rule, if



adopted, will not have a significant economic impact upon credit unions. Accordingly, the Board has determined that a Regulatory Flexibility Analysis is not required.

#### Paperwork Reduction Act

This rule eliminates a paperwork requirement currently in place, and thereby reduces the paperwork burden of Federal credit unions.

#### List of Subjects in 12 CFR Part 741

Credit unions, Requirements for insurance.

By the National Credit Union Administration Board on the 15th day of July, 1986.

Rosemary Brady,  
Secretary of the NCUA Board.

#### PART 741—[AMENDED]

Accordingly, NCUA has amended Part 741 as follows:

1. The authority citation for Part 741 is revised to read as follows:

Authority: 12 U.S.C. 1766, 12 U.S.C. 1781, 12 U.S.C. 1782, 12 U.S.C. 1789.

2. Section 741.5(b)(1) is revised to read as follows:

#### § 741.5 Insurance premium and one percent deposit.

\* \* \* \* \*

(b) \* \* \*

(1) "Insurance Year" means the period from July 1 through June 30.

[FR Doc. 86-17349 Filed 7-31-86; 8:45 am]

BILLING CODE 7535-01-M

#### DEPARTMENT OF TRANSPORTATION

#### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 86-NM-04-AD; Amdt. 39-5369]

#### Airworthiness Directives; Boeing Model 757-200 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This amendment adds a new airworthiness directive (AD) applicable to certain Boeing Model 757-200 airplanes that requires inspection for proper self-locking torque of certain self-locking nuts, and replacement, if necessary. This action is prompted by detection of several nuts that were found to have insufficient self-locking torque for proper self-locking. This situation, if not corrected, could result in the loss of an affected nut and the loss of proper retention of the associated airplane component.

**EFFECTIVE DATE:** September 5, 1986.

**ADDRESSES:** The service letter specified in this AD may be obtained from the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124-2207. This document may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stanton R. Wood, Airframe Branch, ANM-120S; telephone (206) 431-2924. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive that would require the inspection and replacement, if necessary, of certain self-locking nuts on certain Boeing Model 757 airplanes was published in the *Federal Register* on February 12, 1986 (51 FR 5203). The comment period for the proposal closed on April 6, 1986.

Interested parties have been afforded an opportunity to participate in the making of this amendment. Four comments were received from three commentors.

The first comment was that the AD should reference an FAA-approved service bulletin instead of Boeing Service Letter 757-SL-27-24-A to detail the torque check procedures because special tooling is required that is not listed in the service letter. The Boeing service letter has recently been revised to reference recent revisions to the maintenance manual that clarify the proper tools and procedures to conduct the torque check of the self-locking nuts. The final rule has been revised to reference the revised Boeing service letter.

The second comment was that, because of the size of its fleet of Model 757 airplanes, an operator needs 90 days to comply with the AD. The FAA agrees that the compliance time can be extended from 60 to 90 days after the effective date of this AD without an adverse impact on safety. The final rule has been revised accordingly.

The third comment was that since the FAA Manufacturing Offices have alerted the Model 757 airplane operators, an AD is not necessary. The FAA does not concur that the notification by the FAA is sufficient to assure that the affected self-locking nuts are checked.

The final comment was that the AD was not warranted based upon the available data. The FAA does not concur. Loss of certain self-locking nuts would result in loss of proper retention of the associated airplane component. Faulty nuts have been found on airplanes and in factory stores. The FAA has reviewed the function of the self-locking nuts listed in the NPRM. It has been concluded that loss of the self-locking nut on the rudder pedal adjustment cable retainer will not result in loss of rudder control and cause an unsafe condition. Therefore, this nut has been excepted from the final rule.

It is estimated that 40 airplanes will be affected by this AD, that it will take approximately 20 manhours per airplane to accomplish the required actions, and that the average labor cost will be \$40 per manhour. Based on these figures, the total cost impact of this AD is estimated to be \$32,000.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 16, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities because few, if any, Boeing Model 757 series airplanes are operated by small entities. A final evaluation has been prepared for this regulation and has been placed in the docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new airworthiness directive:

**Boeing:** Applies to all Model 757-200 series airplanes listed in Boeing Service Letter 757-SL-27-24-B, dated June 2, 1986, certificated in any category.

To detect nuts that have insufficient self-locking torque characteristics, installed on the nose gear door actuator attachment, main



landing gear jury brace support attachment, main landing gear forward trunnion drag fitting aft attachment, and the P&W 2037 engine front evenner bar attachment, accomplish the following, unless already accomplished:

A. Within the next 90 days after the effective date of this AD, check the Category II self-locking nuts, P/N BACN10JC12CM or BACN10JC12CD, except the rudder pedal adjustment cable retainer self-locking nut, for proper self-locking torque in accordance with Paragraph II of Boeing Service Letter 757-SL-27-24-B, dated June 2, 1986, or later FAA-approved revision, if any self-locking nut is found not to meet the self-locking torque criteria of Boeing Service Letter 757-SL-27-24-B, dated June 2, 1986, or later FAA-approved revision, it must be replaced prior to further flight with a nut which meets the self-locking torque criteria.

B. An alternate means of compliance or adjustment of the compliance time, which provide an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections and/or modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service document from the manufacturer may obtain copies upon request to Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124. This document may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective September 5, 1986.

Issued in Seattle, Washington on July 23, 1986.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 86-17305 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 85-NM-145-AD; Amdt. 39-5377]

#### Airworthiness Directives; British Aerospace Viscount Model 800 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adds a new airworthiness directive (AD) that requires modification of the aircraft hydraulic system cut out valve on

British Aerospace (BAe), Aircraft Group, Viscount Model 800 Series Airplanes. This action is taken as a result of a report of an inadvertent withdrawal of the mechanical nose landing gear downlock on a Viscount Model 700 series airplane, which caused the nose landing gear to collapse. Since the Viscount Model 800 series airplanes use this same part, the potential exists for these airplanes to be subject to this failure.

EFFECTIVE DATE: September 8, 1986.

ADDRESSES: The service bulletin specified in this AD may be obtained upon request to British Aerospace Inc., Box 17414, Dulles International Airport, Washington, D.C. 20041. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

#### FOR FURTHER INFORMATION CONTACT:

Ms. Judy Golder, Standardization Branch, ANM-113; telephone (206) 431-2909. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive, which requires modification of the aircraft hydraulic system cut out valve on British Aerospace Viscount Model 800 Series Airplanes to prevent inadvertent withdrawal of the nose landing gear downlock, was published in the *Federal Register* on March 4, 1986 (51 FR 7447).

Interested parties have been afforded an opportunity to participate in the making of this amendment. No comments were received.

After careful review of the available data, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 2 airplanes of U.S. registry will be affected by this AD, that it will take approximately 10 manhours per airplane to accomplish the required actions, and that the average labor cost will be \$40 per manhour. Modification parts are estimated at \$600 per airplane. Based on these figures, the total cost impact of this AD to U.S. operators is estimated to be \$2,000.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) and it is further certified under the criteria of the Regulatory Flexibility Act

that this rule will not have a significant economic effect on a substantial number of small entities because of the minimal cost of compliance per airplane (\$1,000). A final evaluation has been prepared for this regulation and has been placed in the docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new airworthiness directive:

**British Aerospace Viscount:** Applies to Vickers Viscount Model 800 series airplanes, certificated in any category. Compliance is required as indicated, unless previously accomplished. To prevent nose landing gear collapse as a result of a faulty hydraulic cut out valve, accomplish the following:

A. Within the next 1,000 hours time-in-service or nine months after the effective date of this AD, whichever occurs first, modify the cut out valve, Part Number AIR 41916, in accordance with Automotive Products Modification Standard SA 3490, dated December 16, 1959 (reference BAe Technical News Sheet No. 232, Issue 1, dated August 5, 1985).

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections and/or modifications required by this AD.

All persons affected by this directive, who have not already received the appropriate service document from the manufacturer, may obtain copies upon request to British Aerospace, Inc., Box 17414, Dulles International Airport, Washington, D.C. 20041. This document may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.



This amendment becomes effective September 8, 1986.

Issued in Seattle, Washington, on July 25, 1986.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 86-17299 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 85-NM-157-AD; Amdt. 39-5378]

#### Airworthiness Directives; Canadair Model CL-44D4 and CL-44J Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This Amendment adopts a new airworthiness directive (AD), applicable to Canadair Model CL-44D4 and CL-44J airplanes, which requires an initial and repetitive fluorescent penetrant inspection of the aft attachment lugs on the upper forging of the main landing gear, and replacement of this forging if the lugs are found cracked. This amendment is prompted by reports of stress corrosion cracks found running lengthwise of both upper and lower lugs on the main gear upper forgings on several CL-44 airplanes. This condition, if not corrected, could result in the inability of the landing gear to extend or retract.

**EFFECT DATE:** September 8, 1986.

**ADDRESSES:** The applicable service information may be obtained from Canadair Limited, Commercial Aircraft Technical Services, Box 6087, Station A, Montreal, Quebec, Canada H3C 3G9. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York.

**FOR FURTHER INFORMATION CONTACT:** Mr. Lester Lipsius, Aerospace Engineer, Airframe Branch, ANE-172, New York Aircraft Certification Office, FAA, New England Region, 181 South Franklin Avenue, Valley Stream, New York 11581; Telephone Number (516) 791-6220.

**SUPPLEMENTARY INFORMATION:** A proposal to amend Part 39 of the Federal Aviation Regulations to include an airworthiness directive which requires an initial and repetitive fluorescent penetrant inspection of the aft attachment lugs on the upper forging of the main landing gear, and replacement of this forging if the aft lugs are found

cracked, was published in the *Federal Register* on February 28, 1986, (51 FR 3472).

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the one comment received.

Canadair requested that Service Information Circular (SIC) No. 446-CL44, now known as the "Britavia repair," be included in the AD as an alternate means of compliance.

Canadair issued SIC No. 446-CL44, dated May 17, 1983, which offered a modification known as the "Britavia repair" for landing gear lugs with damaged aft attachment lugs on the upper forging. The repair was approved by Canadair's Design Approval Representative (DAR) on behalf of the Canadian Ministry of Transport.

The FAA contacted Transport Canada in order to determine if the repair was an acceptable alternate means of compliance with their published AD CF-85-09, effective August 26, 1985. Transport Canada advised that only Canadair SIC No. 419-CL44, dated May 18, 1978, is approved for use in compliance with Canadian AD CF-85-09, and that SIC No. 446-CL44 is not approved by Transport Canada as an alternate means of compliance with the AD. They further advised that the "Britavia repair" was developed many years previous to their AD, and they have requested that Canadair provide data to substantiate the repair. Transport Canada has not received such substantiation to date.

The FAA does not agree with this comment for the reasons stated above.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the following rule.

It is estimated that 7 airplanes of U.S. registry will be affected by this AD, that it would take approximately 32 manhours per airplane to accomplish the required actions, and the average labor cost would be \$40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$8,960.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities, because few, if any, Model CL-44 airplanes are operated by

small entities. A final evaluation has been prepared for this regulation and has been placed in the docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new airworthiness directive:

**Canadair:** Applies to all Canadair CL-44D4 and CL-44J airplanes certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent failure of the aft attachment lugs on the main landing gear upper forging, P/N 44-87573-2, accomplish the following, unless already accomplished.

A. Within the next 30 days after the effective date of this Airworthiness Directive (AD), and at intervals thereafter not to exceed 2000 hours time-in-service or one year, whichever occurs first:

1. Remove the parts shown in Figure 1 of Canadair Service Information Circular (SIC) No. 419-CL44, dated May 18, 1978, from both main landing gear legs: jack attach bracket assemblies, P/N 44-87593; spacers, P/N 44-87639; pins, P/N 44-87725-2; attaching parts, and bushings, P/N 44-87624-2, if necessary.

2. Inspect the bore of the upper and lower jack attachment lugs of the left and right main gear leg upper forgings, P/N 44-87573-2, for cracks, using fluorescent penetrant procedures.

3. Replace cracked parts, prior to further flight, with serviceable parts of the same part number which have been inspected in accordance with the requirements of this AD.

B. Alternate means of compliance which provide an acceptable level of safety may be used when approved by the Manager, New York Aircraft Certification Office, FAA, New England Region.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of the inspections and replacement of parts required by this AD.

D. Upon the request of an operator, an FAA Maintenance Inspector, subject to approval by the Manager, New York Aircraft Certification Office, FAA, New England Region, may adjust the inspection times specified in this AD to permit compliance at an established inspection period of that



operator if the request contains substantiating data to justify the change for that operator.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Canadair Limited, Commercial Aircraft Technical Services, Box 6087, Station A, Montreal, Quebec H3C 3G9, Canada. These documents may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York.

This Amendment becomes effective September 8, 1986.

Issued in Seattle, Washington, on July 25, 1986.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 86-17298 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 86-NM-154-AD; Amdt. 39-5375]

#### Airworthiness Directives; McDonnell Douglas Corporation Model DC-10 and KC-10A (Military) Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) which requires purging of wing spar mounted fuel fire shutoff valves on McDonnell Douglas Model DC-10 and KC-10A (Military) series airplanes. This AD is prompted by reports of restricted movement of emergency fire handles that are necessary for emergency fuel shutoff and to discharge the fire agent. This AD is necessary to reduce the potential unsafe condition resulting from the loss of fuel shutoff and fire extinguishing capabilities.

**EFFECTIVE DATE:** August 18, 1986.

Compliance schedule as prescribed in the body of the AD, unless already accomplished.

**ADDRESSES:** The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director, Publications and Training, C1-750 (54-60). This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 4344 Donald Douglas Drive, Long Beach, California.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Roy A. McKinnon, Aerospace Engineer, Propulsion Branch, ANM-140L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 4344 Donald Douglas Drive, Long Beach, California 90808; telephone (213) 514-6327.

**SUPPLEMENTARY INFORMATION:** Four operators have reported twenty-three instances where the wing spar mounted fuel fire shutoff valves could not be closed. Investigation revealed that water, which is usually present in the fuel, can accumulate and freeze in the valve mechanism cavity. Nineteen instances occurred on engine No. 2, and four on engine No. 1. Examination of these valves revealed that water in the fuel can accumulate and freeze in the actuating mechanism cavity and valve gate groove. Ice formation in either one of those locations can prevent the valve from closing completely. Partial closure of the valve can prevent the full travel of the flight compartment emergency fire handle, which is necessary to shutoff the fuel and engage the electrical switch used to discharge the fire agent. Inability to shutoff the fuel and discharge the fire bottles due to malfunction of the fuel fire shutoff valve could result in an uncontrolled engine fire.

AD 86-09-10 was issued April 30, 1985, to require draining and grease packing of wing spar mounted and aft fuselage mounted fuel fire shutoff valves on McDonnell Douglas Model DC-10 and KC-10A (Military) series airplanes. The AD was prompted by reports of restricted movement of emergency fire handles that are necessary to discharge the fire agent. The AD was necessary to reduce the potential unsafe condition resulting from the loss of fuel shutoff and fire extinguishing capabilities. Investigation had shown that water can accumulate in the valve body cavity and in the gate groove. AD 86-09-10 addressed the body cavity problem. This AD addresses the gate groove accumulation and requires purging the wing spar mounted valves which will minimize the possibility of ice forming in the valve gate grooves.

McDonnell Douglas Alert Service Bulletin A28-55, Revision 1, dated July 17, 1986, has been issued to provide operators with instructions on how to purge the fuel fire shutoff valves.

The FAA is considering further regulatory action that will constitute terminating action for AD 86-09-10 and this AD.

Since this situation is likely to exist or develop on other airplanes of the same type design, this AD requires repetitive

purging of the fuel fire shutoff valves in accordance with the Alert Service Bulletin mentioned above.

Further, since a situation exists that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

The Federal Aviation Administration has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required).

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

1. The authority citation for Part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new AD:

**McDonnell Douglas:** Applies to McDonnell Douglas Model DC-10 and KC-10A (Military) series airplanes, certificated in any category. To preclude a potential unsafe condition from loss of fuel shutoff and fire extinguishing capabilities, accomplish the following within the next 30 days after the effective date of this AD, unless accomplished within the last 15 days:

A. Perform an initial purging of the wing spar mounted engine No. 1, No. 2, and No. 3 fuel fire shutoff valves in accordance with the gate groove purging procedure specified in McDonnell Douglas DC-10 Alert Service Bulletin A28-55, Revision 1, dated July 17, 1986.



B. Repeat the valve gate groove purging in accordance with the above alert service bulletin at intervals not to exceed 45 days, or 500 hours' time in service, whichever occurs first.

C. An alternate means of compliance with this AD which provides an acceptable level of safety may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a base for accomplishment of the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director, Publications and Training, C1-750 (54-60). These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington or the Los Angeles Aircraft Certification Office, 4344 Donald Douglas Drive, Long Beach, California.

This amendment becomes effective August 18, 1986.

Issued in Seattle, Washington, on July 25, 1986.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 86-17296 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 85-NM-171-AD; Amdt. 39-5376]

#### Airworthiness Directives; SAAB Fairchild Corporation Model SF-340A Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends and publishes in the *Federal Register*, and makes effective as to all persons, an amendment adopting a new airworthiness directive (AD), which was previously made effective as to all known U.S. owners and operators of SAAB Fairchild Corporation Model SF-340A series airplanes by individual telegrams. This AD requires a series of operating restrictions in response to reports of engine flameouts. This action is necessary to prevent engine flameouts which may occur during flight in icing conditions. Terminating action for certain of the operation restrictions is also provided.

**EFFECTIVE DATE:** August 18, 1986.

This AD was effective earlier to all recipients of telegraphic AD T85-26-51, dated December 31, 1985. Compliance schedule as prescribed in the body of the AD, unless already accomplished.

**ADDRESSES:** The applicable service information may be obtained from SAAB Scania, Product Support, S-58188, Linköping, Sweden. This information may be examined at the Federal Aviation Administration, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

#### FOR FURTHER INFORMATION CONTACT:

Ms. Judy Golder, Standardization Branch, ANM-113; telephone (206) 431-2909. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68968, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:** Within the last year, there have been five reports of engine flameout during cruise and descent between 11,000 and 16,000 feet altitude and at an ambient temperature of between minus 5 degree centigrade, and plus one degree centigrade in icing conditions. In all cases, the engines were startable, even though in some cases minor compressor damage was noted. This condition, if not corrected, could result in a single or dual engine flameout in a critical phase of flight.

Emergency telegraphic AD T85-24-51, issued November 29, 1985, required revision of the FAA approved airplane flight manual (AFM) to impose new operating restrictions and repetitive engine inlet inspections for flight in icing conditions. Following issuance of this AD, an additional engine flameout incident occurred with prompted the FAA to issue emergency telegraphic AD T85-25-52 on December 10, 1985, which superseded AD T85-24-51. This AD imposed further operating restrictions, which prohibited all revenue flight and non-revenue flight in instrument meteorological conditions (IMC), or known or forecasted icing conditions.

Following issuance of AD T85-25-52, the FAA determined that certain flight operations prohibited by this AD could be conducted safely if certain inspections and modifications were accomplished, and if flight in known or forecasted icing conditions, or conditions in which icing could reasonably be expected to occur was prohibited. Telegraphic AD T85-25-57, which superseded AD T85-25-52, was issued on December 20, 1985, and allowed the airplanes to be used for limited operation.

Since the issuance of AD T85-25-57, the manufacturer completed additional investigations, which more clearly define the impact of an engine flameout and re-ignition during critical phases of flight. As a result, the FAA determined that additional flight operations could be conducted safely. AD T85-26-51 issued on December 31, 1985, superseded AD T85-25-27, and modified its provisions by removing the restrictions against operating the airplane in icing conditions or in other than day visual flight rule conditions below 10 degrees centigrade, and by imposing takeoff restrictions and requirements for further inspections, and modifications intended to reduce the possibility of engine flameout.

After AD T85-26-51 was issued, it was determined that the restriction against takeoff in slush conditions could be removed if Modification 1185, as described in SAAB Fairchild Service Bulletin SF340-54-002, Revision 1, dated April 3, 1985, was accomplished. This amendment removes the restriction on takeoff in slush from AD T85-26-51 if the modification has been accomplished.

It has also been determined that, as a result of testing conducted, that the 10° C threshold restriction for operation of the anti-icing system can be removed if Modification 1319, as described in SAAB Fairchild Service Bulletin SF340-71-017, dated November 22, 1985, has been accomplished. This amendment removes the 10° C threshold restriction from AD T85-26-51 if the modification has been accomplished.

Since a situation existed, and still exists, that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

The Federal Aviation Administration has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in the aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 29, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required).



**List of Subjects in 14 CFR Part 39**

Aviation safety, Aircraft.

**Adoption of the Amendment****PART 39—[AMENDED]**

Accordingly, pursuant to the authority delegated to me by the Administrator, § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449; January 12, 1983); and 14 CFR 11.89.

**§ 39.13 [Amended]**

2. By adding the following new airworthiness directive:

**SAAB Fairchild:** Applies to all Model SF-340A series airplanes, certificated in any category. Compliance as shown below. To minimize the hazards associated with engine flameout due to potential ice ingestion, accomplish the following, unless previously accomplished:

A. Prior to further flight, install a continuous ignition switch by incorporating the provisions of SAAB Fairchild SF-340 Service Bulletin SF340-74-002, Revision 1, dated December 15, 1985.

B. Incorporate the following into the limitations section of the airplane flight manual. This may be accomplished by including a copy of this AD in the airplane flight manual.

1. Takeoff in conditions of slush on the runway is prohibited unless Modification 1185, "Nacelle—Exhaust Nozzle—Improved Drainage and Ventilation of Inlet Protection Device (IPD) and Special Inspection," as described in SAAB Fairchild Service Bulletin SF340-54-002, Revision 1, dated April 3, 1985, has been accomplished.

2. Turn the engine and propeller anti-ice systems on and set the ignition ("IGN") switch to the continuous ("CONT") position during all operation in which icing could reasonably be expected to occur and for a period of five minutes after these conditions no longer exist.

3. In the definition of icing conditions stated in the FAA approved flight manual on page 2-11, change the temperature stated in "Icing Conditions," paragraph 1, line 4, from "5° C" to "10° C," unless Modification 1319, "Installation of New Lower Inlet, IPD and Exhaust Nozzle," as described in SAAB Fairchild Service Bulletin SF340-71-017 dated November 22, 1985, has been accomplished. If this modification has been accomplished, "5° C" can remain in the definition.

C. Conduct engine performance monitoring in accordance with General Electric Operating Engineering Bulletin (OEB) 2, Revision 4, dated December 14, 1985, or later FAA-approved revision.

D. Prior to further flight, and at intervals specified in General Electric OEB 4, Revision 4, dated December 14, 1985, or later FAA-approved revisions, perform an inspection and perform maintenance, as necessary, of the ignition system in accordance with that OEB.

E. Unless Modification 1319, as described in paragraph B.3., above, has been accomplished, in the event of an icing encounter, an inspection must be accomplished prior to the next departure to assure that no snow, ice, or slush accumulation is present in or around the inlet or the inlet protection device.

F. Following each flameout or re-ignition event, conduct an inspection of Stage 1 compressor blades, in accordance with General Electric OEB 4, Revision 4, dated December 14, 1985, or later FAA-approved revisions.

G. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Standardization Branch, ANM-113, FAA, Northwest Mountain Region.

H. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections and modifications required by this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer, may obtain copies upon request to SAAB Scania, Product Support, S-58188, Linköping, Sweden. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective August 18, 1986.

As to all persons, except those persons to whom it was made immediately effective by telegraphic AD T85-26-51, issued December 31, 1985.

This supersedes telegraphic AD T85-25-87 issued December 20, 1985.

Issued in Seattle, Washington, on July 25, 1986.

Joseph W. Harrell,  
Acting Director, Northwest Mountain Region.  
[FR Doc. 86-17300 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****14 CFR Part 1204****Administrative Authority and Policy**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Final rule.

**SUMMARY:** 14 CFR Part 1204 is amended by revising the authority citation for § 1204.504, "Delegation of Authority to Grant Leaseholds, Permits, and Licenses in Real Property." Section 1204.504 is also revised to reflect NASA's current organization.

**EFFECTIVE DATE:** August 1, 1986.

**FOR FURTHER INFORMATION CONTACT:** James M. Bayne, 202-453-1950.

**SUPPLEMENTARY INFORMATION:** Since this revision involves only agency organization and management procedures, no public comment period is required.

The National Aeronautics and Space Administration has determined that:

1. This rule is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, since it will not exert a significant economic impact on a substantial number of entities.

2. This rule is not a major rule as defined in Executive Order 12291.

**List of Subjects in 14 CFR Part 1204**

Airports, Authority delegation (Government agencies), Federal buildings and facilities, Government contracts, Government employees, Government procurement, Grant programs science and technology, Intergovernmental relations, Labor unions, Security measures, Small businesses.

**PART 1204—ADMINISTRATIVE AUTHORITY AND POLICY**

For reasons set out in the Preamble, 14 CFR Part 1204 is amended as follows:

1. The authority citation for Subpart 5 is revised to read as follows:

Authority: 42 U.S.C. 2473.

2. Section 1204.504 is revised to read as follows:

**§ 1204.504 Delegation of authority to grant leaseholds, permits, and licenses in real property.**

(a) *Delegation of authority.* The National Aeronautics and Space Act of 1958, as amended, authorizes NASA to grant leaseholds, permits, and licenses in real property. This authority is delegated to the Associate Administrator for Management and the Director, Facilities Engineering Division.

(b) *Definition.* "Real Property" means land, buildings, other structures and improvements, appurtenances, and fixtures located thereon.

(c) *Determination.* It is hereby determined that grants of leaseholds, permits, or licenses made in accordance with the provisions of this section will not be adverse to the interests of the United States.

(d) *Redelegation.* (1) The Directors of Field Installations with respect to real property under their supervision and management may, subject to the restrictions in paragraph (e) of this



section, grant a leasehold, permit, or license to any person or organization, including other Government agencies, a State, or political subdivision or agency thereof. This authority may not be exercised with respect to real property which is (i) excess within the meaning of 40 U.S.C. 472(e), or (ii) proposed for use by a NASA exchange and subject to the provisions of NASA Management Instruction 9050.6, NASA Exchange Activities.

(2) The Directors of Field Installations may redelegate this authority to only two senior management officials of the Field Installation concerned.

(e) *Restrictions.* Except as otherwise specifically provided, no leasehold, permit, or license shall be granted under the authority stated in paragraph (d) of this section unless:

(1) The Director of the Field Installation concerned determines:

(i) That the interest to be granted is not required for a NASA program.

(ii) That the grantee's exercise of rights granted will not interfere with NASA operations.

(2) Fair value in money is received by NASA on behalf of the Government as consideration.

(3) The instrument provides:

(i) For a term not to exceed 5 years.

(ii) For the termination thereof, in whole or in part, and without cost to the Government if there has been:

(A) A failure to comply with any term or condition of the grant; or

(B) A determination by the Associate Administrator for Management, the Director, Facilities Engineering Division, or the Director of the Field Installation concerned that the interests of the national space program, the national defense, or the public welfare require the termination of the interest granted; and a 30-day notice, in writing, to the grantee that such determination has been made.

(iii) That written notice of termination shall be given to the grantee, or its successors or assigns, by the Associate Administrator for Management, the Director, Facilities Engineering Division, or the Director of the Field Installation concerned, and that termination shall be effective as of the date specified by such notice.

(iv) For any other reservations, exceptions, limitations, benefits, burdens, terms, or conditions necessary to protect the interests of the United States.

(f) *Waivers.* If, in connection with a proposed grant, the Director of a Field Installation determines that a waiver from any of the restrictions set forth in paragraph (e) of this section is appropriate, a request may be submitted

to the Associate Administrator for Management or the Director, Facilities Engineering Division.

(g) *Services of the Corps of Engineers.* In exercising the authority herein granted, the Directors of Field Installations, pursuant to the applicable provisions of any cooperative agreement between NASA and the Corps of Engineers (in effect at the time), may:

(1) Utilize the services of the Corps of Engineers, U.S. Army.

(2) Delegate authority to the Corps of Engineers to execute, on behalf of NASA, any grants of interests in real property as authorized in this section provided that the conditions set forth in paragraphs (e) and (f) of this section are complied with.

(h) *Distribution of Documents.* One copy of each document granting an interest in real property, including instruments executed by the Corps of Engineers, will be forwarded for filing in the Central Depository for Real Property Documents to: National Aeronautics and Space Administration, Real Estate Management Branch (Code NXG), Facilities Engineering Division, Washington, DC 20546.

James C. Fletcher,  
Administrator.

[FR Doc. 86-17307 Filed 7-31-86; 8:45 am]

BILLING CODE 7510-01-M

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 1, 5, 16, and 33

#### Domestic Exchange-Traded Commodity Options; Revisions to Rules for Trading Non-Agricultural Option Contracts and Termination of Pilot Program Status

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of effective date of rule amendment.

**SUMMARY:** On May 13, 1986, the Commodity Futures Trading Commission ("Commission") published in the *Federal Register* various amendments to the rules governing option trading (51 FR 11905). In particular, these amendments terminated the pilot status of the program for the trading of options on futures contracts on other than domestic agricultural commodities and made permanent the status of such trading. In that *Federal Register* notice, the Commission indicated that, with the exception of the amendments to Part 16 which become effective on September 10, 1986, these amendments would

become effective following the expiration of 30 calendar days of continuous session of Congress after the transmittal of the rule amendments and related materials to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry and the publication in the *Federal Register* of a notice of the effective date of the rule amendments.

The Congressional review period specified in section 4c(c) of the Act (7 U.S.C., 6c(c)) has now expired. Accordingly, the Commission is providing notice that the amendments to Parts 1, 5, and 33 of its regulations as published at 51 FR 17464 have become effective.

**EFFECTIVE DATE:** August 1, 1986.

#### FOR FURTHER INFORMATION CONTACT:

Paul M. Architzel, Chief Counsel, Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Telephone: (202) 254-6990.

#### List of Subjects in 17 CFR Part 33

Commodity options, Commodity futures, Commodity exchange designation procedures.

Issued in Washington, DC, on July 29, 1986, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 86-17368 Filed 7-31-86; 8:45 am]

BILLING CODE 8351-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Parts 154, 157, 270, 271, and 284

[Docket Nos. RM86-3-006, RM86-3-062]

#### Ceiling Prices; Old Gas Pricing Structure

Issued July 28, 1986.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Order Denying Petitions for Stay of Final Rule.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is issuing an order denying petitions for an immediate stay of the final rule that establishes new ceiling prices under sections 104(b)(2) and 106(c) of the Natural Gas Policy Act of 1978, and provides for "good faith negotiation" procedures, and certain implementing



authorizations. The Commission finds, in its order, that the petitioners requesting an immediate stay have not shown that such extraordinary relief is warranted. The final rule became effective July 18, 1986, and was on that day stayed by the Commission until July 30, 1986 (51 FR 27018), pursuant to a request from the United States Court of Appeals for the Eighth Circuit.

**DATE:** This order was issued July 28, 1986.

**FOR FURTHER INFORMATION CONTACT:** Peter J. Roidakis, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357-8224.

**SUPPLEMENTARY INFORMATION:** On June 6, 1986, the Commission issued Order No. 451<sup>1</sup> establishing new ceiling prices under sections 104(b)(2) and 106(c) of the Natural Gas Policy Act of 1978 (NGPA)<sup>2</sup> and adopting regulations governing implementation of the revised pricing structure. Of the approximately sixty applications for rehearing that have been timely filed with the Commission, a small number included requests for stay of the effectiveness of Order No. 451. The Commission is denying the requests of KN Energy, Inc. (KN),<sup>3</sup> and certain Florida Cities (Cities) for an immediate stay of the effectiveness of the order.<sup>4</sup>

Petitioners argue that under Order No. 451, pipelines will be compelled to enter into price renegotiations with their producer suppliers at substantial and impermissible disadvantages, namely: (1) The pipelines becoming common carriers as of November 1, 1986; and (2) the producer suppliers possessing the right to initiate unilateral negotiations

with third parties for higher gas prices.<sup>5</sup> Petitioners allege that Order No. 451 will result in financial harm to customers of pipelines, in the form of gas price increases, with concomitant substantial dollar losses to the pipelines as a result of loss of load. On the other hand, petitioners allege, the only parties who arguably would be harmed if Order No. 451 is stayed are natural gas producers. Finally, according to petitioners, failure to grant a stay of the rule pending rehearing or judicial review would allow the Commission to continue to exceed its legal authority and therefore cause irreparable damage to the pipeline industry and consumers at large.

In reviewing a request for a stay, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. 705 (1982), *i.e.*, if the Commission finds that "justice so requires." If this standard is not met, this Commission follows a general policy of denying motions for stays of its orders, based on the need for definitiveness and finality in administrative proceedings.<sup>6</sup>

The Commission is not persuaded by petitioners' arguments to stay the effectiveness of its regulations.

First of all, petitioners have not shown that implementation of the Order No. 451 regulations will cause imminent, irreparable harm to them or will not otherwise be in the public interest in its impact on consumers or the natural gas industry in general. Because of the importance of the rule for consumers and the industry, the Commission provided a transition period for parties to natural gas contracts to voluntarily determine if, when, and under what terms to renegotiate their gas prices under the new ceiling price established by Order No. 451. For this reason, new § 270.201(b) of the Commission's regulations prevents any producer from initiating renegotiation under the "good faith negotiation" procedure in Order No. 451 until November 1, 1986.

In addition, by using all the time provided for renegotiation under new § 270.201 of the Commission's regulations, the purchaser, at its discretion, may extend the negotiation procedure until late winter, 1987 even for price renegotiation initiated as early as November 1, 1986. During this time, then, a producer of sections 104 and 106(a) gas may not charge a price up to

the new ceiling price under an existing contract with its pipeline purchaser unless the price is agreed to by the existing purchaser. Therefore, such producer must continue to sell the gas to the purchaser during this period as well as prior to November 1, 1986 under the same contractual terms and conditions that applied before Order No. 451. *See* new § 271.402(c)(7) of the Commission's regulations, 51 FR 22220 (June 18, 1986). Thus, Order No. 451 will not cause petitioners imminent, irreparable harm because the final rule in fact ensures that a purchaser will not be compelled to negotiate or pay a higher price for gas under the new ceiling price, unless it agrees to do so.

Likewise, the Commission finds that the transportation provisions in Order 451 will not cause imminent, irreparable harm to the petitioners, because the availability of such transportation is expressly delayed at the discretion of existing pipeline purchasers until the gas to the transporter is released due to termination of purchases or abandonment under the "good faith negotiation" procedure. *See* new § 270.201(b) of the Commission's regulations. Because under the good faith negotiation procedure, an existing purchaser can delay the termination of purchases or abandonment of gas at its discretion as much as 90 to 120 days following a producer's initiation of renegotiation after November 1, 1986, the transportation provisions in Order No. 451 cannot even take effect over the objection of a purchaser before late winter, 1987, at the earliest.

On the other hand, the Commission finds that delaying Order No. 451 pending rehearing or judicial review would adversely affect the reliability of gas supplies for current and future consumers, and potentially result in the permanent loss of substantial reserves of old gas. The Commission believes that raising the ceiling price for all old gas to that permitted for post-1974 gas will substantially increase recoverable reserves of old gas, because the additional revenue on pre-1975 wells should permit those wells to produce to lower pressure levels. The increase in reserves will be substantial and the DOE prediction of an approximately 11 Tcf increase is the most convincing analysis in the record of what that increase will be. *See* Order No. 451, 51 FR 22191-94 (June 18, 1986).

Furthermore, the Commission has found that the existing ceiling price structure for old gas is the primary cause of continuing price distortions to consumers in natural gas markets. The old gas price structure, therefore, is

<sup>1</sup> 51 FR 22,168 (June 18, 1986).

<sup>2</sup> 15 U.S.C. 3314(b)(2) and 3316(c) (1982).

<sup>3</sup> On July 1, 1986, KN filed a petition in the United States Court of Appeals for the Eighth Circuit requesting a writ of prohibition or, alternatively, a writ of mandamus directing the Commission to vacate Order No. 451. On July 17, 1986, KN filed a motion requesting that Court to stay the effectiveness of Order No. 451 pending disposition of its petition for a writ. On July 18, 1986, in response to a request by the Court, the Commission stayed the effectiveness of Order No. 451 until July 30, 1986. (51 FR 27018) The Commission, of course, recognizes the Court's authority in this case; accordingly, in acting on the stay applications filed with the Commission, the Commission means simply to exercise its own jurisdiction as it relates to the stay petitions filed with it.

<sup>4</sup> In addition, several applicants requested a stay in the event their applications for rehearing were denied. These include the American Public Gas Association in Docket No. RM86-3-004, the Interstate Power Council in Docket No. RM86-3-012, the Northern Distributor Group in Docket No. RM86-3-013, and Laclede Gas Company in Docket No. RM86-3-009. These requests cannot be acted upon until the Commission has evaluated the arguments raised and issued its order on rehearing.

<sup>5</sup> KN Application for Rehearing and Request for Stay at 43; *see also* Florida Cities' Request for Rehearing and Stay of FERC Order No. 451, filed July 7, 1986, Docket No. RM86-3-062, at 33, with

<sup>6</sup> *See, e.g.,* Arkansas Louisiana Gas Co., 23 FERC ¶ 61,324 (1983).



unjust and unreasonable within the meaning of the Natural Gas Act. To delay the effectiveness of Order No. 451 would only perpetuate the existing unjust and unreasonable ceiling price structure and its harm to consumers and the industry alike. Delaying the rule would also delay the just and reasonable price structure which the Commission is obligated to fix under its Natural Gas Act and NGPA authority once the existing prices have been found unjust and unreasonable. See 51 FR 22179-90 ("B. Deficiencies in Old Gas Price Structure"; "C. Proposed Old Gas Ceiling Price"). For these reasons, the Commission finds that staying the effectiveness of Order No. 451 would not be in the public interest and would unjustifiably delay the market-responsive pricing and supply benefits to consumers intended by the final rule.

The Commission looks to "the interests of the market as a whole . . . in the determination of how the public's needs are best served." <sup>7</sup> Initially there may be some adjustment required by some participants in the gas market that benefited from the distortions inherent in the old vintage-based ceiling price structure. However, consumers in the recent past suffered shortages and higher prices under the current price system for old gas, and these distortions would cause more damage to consumers in the future, if existing reserves continue to be sold at less than replacement cost. Keeping old gas ceiling prices below replacement cost would revive shortages and high prices for future generations of consumers.

The Commission has chosen to price old gas at its replacement cost, while at the same time requiring producers and pipelines under existing contracts which authorize higher prices to go through the "good faith negotiation" procedure before the producer may sell the gas to any other purchaser. Under this balance in Order No. 451, the overall competitive benefits of more accurate price signals, coupled with the long-term benefits of enhanced supplies of existing gas reserves, will outweigh the risks of any isolated price increases on individual pipeline systems. As an added protection, the Commission intends to scrutinize purchased gas adjustment (PGA) filings by pipelines very carefully, to assure that filings are not based on the worst possible outcome of negotiations under the final rule. The Commission will exercise its suspension authority liberally to assure that PGAs track actual gas costs as realistically as

possible. See Order No. 451, 51 FR 22203 (June 18, 1986).

In light of the foregoing, the Commission finds that justice does not require further postponing the effective date of Order No. 451, and the petitions for a stay are denied. However, these denials are without prejudice to the Commission's consideration of the merits of KN and Cities' requests for rehearing filed before the Commission.

By the Commission.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 86-17324 Filed 7-31-86; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Parts 436, 440, and 442

[Docket No. 86N-0269]

#### Antibiotic Drugs; Updating and Technical Changes

**AGENCY:** Food and Drug Administration.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the antibiotic drug regulations by making an updating and two minor noncontroversial technical changes in certain regulations providing for accepted standards of antibiotic and antibiotic-containing drugs for human use. These changes will result in more accurate and usable regulations.

**DATES:** August 1, 1986; comments, notice of participation, and request for hearing by September 2, 1986; data, information, and analyses to justify a hearing by September 30, 1986.

**ADDRESS:** Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

#### FOR FURTHER INFORMATION CONTACT:

Richard Norton, Center for Drugs and Biologics (HFN-815), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4290.

**SUPPLEMENTARY INFORMATION:** FDA is amending the antibiotic drug regulations by making an updating and two minor noncontroversial technical changes in certain antibiotic drug regulations that provide for the accepted standards of antibiotic and antibiotic-containing drugs intended for human use. To aid the reader in understanding the types of amendments included in this document,

the amendments have been grouped into two general classes for discussion in this preamble: updating and technical changes.

#### Updating

In § 436.201(b)(1), the fourth sentence is revised to provide for the use of commercially prepared pyridine-free Karl Fischer reagent.

#### Technical Changes

1. In § 440.13a(a)(1)(vi), the pH range for sterile carbenicillin disodium (6.5 to 8.0) is revised to read 6.0 to 8.0. One manufacturer has submitted adequate data to support this revision. The agency has contacted the only other manufacturer and this firm supports the revision.

2. In § 442.14a(b)(1), the microbiological agar diffusion and the hydroxylamine colorimetric assays are replaced with a high-pressure liquid chromatographic assay for determining the potency of sterile cefoxitin sodium. The sole manufacturer has submitted adequate data to support this revision.

#### Environmental Impact

The agency has determined under 21 CFR 25.24(c)(6) (April 26, 1985; 50 FR 16636) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### Submitting Comments and Filing Objections

These amendments institute changes that are corrective, editorial, or of a minor substantive nature. Because the amendments are not controversial and because when effective they provide notice of accepted standards, FDA finds that notice, public procedure, and delayed effective date are unnecessary and not in the public interest. The amendments, therefore, shall become effective August 1, 1986. However, interested persons may, on or before September 2, 1986, submit written comments on this regulation to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this regulation may file

<sup>7</sup> Felmott Oil Corp. and Essex Offshore, Inc., Docket No. C184-10-000, Opinion No. 245, 33 FERC ¶ 61,333 at 61,657 (1985).



objections to it and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file (1) on or before September 2, 1986, a written notice of participation and request for hearing, and (2) on or before September 30, 1986, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 314.300. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the heading of this order and filed with the Dockets Management Branch.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 314.300.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

#### List of Subjects

##### 21 CFR Part 436

Antibiotics.

##### 21 CFR Part 440

Antibiotics.

##### 21 CFR Part 442

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Parts 436, 440, and 442 are amended as follows:

#### PART 436—TESTS AND METHODS OF ASSAY OF ANTIBIOTIC AND ANTIBIOTIC-CONTAINING DRUGS

1. The authority citation for 21 CFR Part 436 continues to read as follows:

Authority: Sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357); 21 CFR 5.10.

2. Section 436.201 is amended in paragraph (b)(1) by revising the fourth sentence to read as follows:

##### § 436.201 Moisture determination.

(b) *Reagents*—(1) *Karl Fischer reagent*. \* \* \* (A commercially prepared Karl Fischer reagent, pyridine containing or pyridine-free, may be used.) \* \* \*

#### PART 440—PENICILLIN ANTIBIOTIC DRUGS

3. The authority citation for 21 CFR Part 440 is revised to read as follows:

Authority: Sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357); 21 CFR 5.10.

##### § 440.13a [Amended]

4. Section 440.13a *Sterile carbenicillin disodium* is amended in paragraph (a)(1)(vi) by changing "6.5" to read "6.0."

#### PART 442—CEPHA ANTIBIOTIC DRUGS

5. The authority citation for 21 CFR Part 442 continues to read as follows:

Authority: Sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357); 21 CFR 5.10.

6. Section 442.14a is amended by revising paragraph (b)(1) to read as follows:

##### § 442.14a Sterile cefoxitin sodium.

(b) *Tests and methods of assay*—(1) *Potency*. Proceed as directed in § 436.347 of this chapter, preparing the working standard and sample solutions and calculating the cefoxitin content as follows:

(i) *Working standard solution*. Dissolve an accurately weighed portion of the cefoxitin working standard with distilled water to obtain a solution containing 1 milligram of cefoxitin per milliliter.

(ii) *Sample solutions*. Dissolve an accurately weighed portion of the sample with distilled water to obtain a solution containing 1 milligram of cefoxitin per milliliter (estimated); and also if it is packaged for dispensing, reconstitute as directed in the labeling. Then using a suitable hypodermic needle and syringe, remove all of the withdrawable contents if it is represented as a single-dose container; or, if the labeling specifies the amount of potency in a given volume of the resultant preparation, remove an accurately measured representative portion from each container. Dilute with

distilled water to obtain a solution containing 1 milligram of cefoxitin per milliliter (estimated).

(iii) *Calculations*—(a) Calculate the cefoxitin content in micrograms per milligram as follows:

$$\text{Micrograms of cefoxitin per milligram} = \frac{A_u \times P_s}{A_s \times C_u}$$

where:

$A_u$  = Area of the cefoxitin peak in the chromatogram of the sample (at a retention time equal to that observed for the standard);

$A_s$  = Area of the cefoxitin peak in the chromatogram of the cefoxitin working standard;

$P_s$  = Cefoxitin activity in the cefoxitin working standard solution in micrograms per milliliter; and

$C_u$  = Milligrams of sample per milliliter of sample solution (estimated).

(b) Calculate the cefoxitin content of the vial as follows:

$$\text{Milligrams of cefoxitin per vial} = \frac{A_u \times P_s \times d}{A_s \times 1,000}$$

where:

$A_u$  = Area of the cefoxitin peak in the chromatogram of the sample (at a retention time equal to that observed for the standard);

$A_s$  = Area of the cefoxitin peak in the chromatogram of the cefoxitin working standard;

$P_s$  = Cefoxitin activity in the cefoxitin working standard solution in micrograms per milliliter; and

$d$  = Dilution factor of the sample.

Dated: July 25, 1986.

Sammie R. Young,

Deputy Director, Office of Compliance.

[FR Doc. 86-17365 Filed 7-31-86; 8:45 am]

BILLING CODE 4160-01-M

#### DEPARTMENT OF TRANSPORTATION

##### Federal Highway Administration

##### 23 CFR Part 635

#### Contract Procedures—Advertising for Bids; Noncollusion Affidavit Requirement

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FHWA is revising its regulation on contract procedures regarding advertising for bids. The



revised regulation will require all persons submitting bids on a Federal-aid highway project to submit with each bid an affidavit of noncollusion. The submission of an affidavit of noncollusion serves to notify bidders that collusion in bidding is a violation of law and will serve in a court or administrative hearing as evidence of intent when other evidence that demonstrates the act of collusion is presented.

**EFFECTIVE DATE:** September 30, 1986.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Bob B. Myers, Chief, Construction and Maintenance Division (202) 366-0392, or Mr. Wilbert Baccus, Office of Chief Counsel, (202) 366-0780, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., ET, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The requirement for the submission of an affidavit of noncollusion is necessary to protect the integrity of the Federal-aid highway program. The authority to issue and implement regulations necessary to carry out the statutory requirements of the program has been delegated by the Secretary to the Federal Highway Administrator. The submission of an affidavit is currently required from the low bidder prior to award of the final contract, but this does not address the problem of collusion among those who are not awarded the contract. A common collusion situation involves participation by both the low bidder and other bidders who submit "complementary" bids. Bidders who are not currently required to file an affidavit of noncollusion may be acting in conjunction as partners with the low bidder.

The Antitrust Division of the U.S. Department of Justice feels that requiring all bidders to submit affidavits of noncollusion will promote several important enforcement objectives of the Antitrust Division as follows:

First, the prosecution of firms that submit non-winning "complementary" or "cover" bids for violating the Sherman Act would be greatly facilitated.

Second, the affidavit serves as evidence of criminal intent and fraud.

Third, noncollusion affidavits may also provide the basis for a combined Sherman Act and mail fraud of false statement prosecution.

Finally, the affidavit requirement plays a worthwhile educational and deterrent role.

States will be required to provide the form for the affidavit to each prospective bidder for inclusion in the

bid package. Any bid submitted without the required affidavit would be considered nonresponsive. All States except Maine now require all bidders to submit noncollusion affidavits with their bids.

A notice of proposed rulemaking was published in the *Federal Register* on March 27, 1985, at 50 FR 12037, in which the FHWA requested comments on the proposed regulation revisions. Comments were to be received on or before May 28, 1985. Only seven written comments were received in the docket. Of the seven comments, three were from State highway agencies and the others were from highway associations and individuals. The three highway agencies supported the rule changes, whereas the other commenters felt the requirement was unnecessary, redundant, and a waste of time and money. One of those opposing the rule change further suggested that the proposed FHWA requirement should only apply to States that do not include the affidavits in their bidding documents. The FHWA does not feel this would be desirable. A requirement such as this should apply to all States. It would also serve as a uniform standard for the States to follow.

The submission of affidavits by all bidders has been suggested by the FHWA for several years. Many States have realized the worth of having the affidavit since the FHWA started promoting the practice.

Requiring the affidavit only codifies prior FHWA guidance. It is appropriate to follow through with this rulemaking even though 49 States have the requirement. It is also desirable to have a uniform Federal requirement rather than several State requirements that may be subject to revision or withdrawal.

Although they supported the proposed rule changes, two State highway agencies suggested that changes be made in order to simplify the procedures and cut paperwork. The first suggestion was to delete the reference to Title 23, United States Code, section 112(c), in the advertised specification. In this way, States could use the same specification language for both Federal-aid and non-Federal projects. The FHWA agrees that it is not necessary to reference Title 23, U.S.C., in the regulation, as the intent of the statute is met. The rule has been revised accordingly.

The other suggestion was to delete the requirement to have the affidavits sent to the FHWA, or alternatively, to advise the FHWA for each project that the statements are on file with the State highway agency. The FHWA agrees that it is unnecessary to receive copies of

each bidder's affidavit. It is also felt to be unnecessary to mention in each award approval letter submitted to the FHWA that the affidavits are on file at the highway agency. Since the affidavits must be submitted in order to make the contractor's bid responsive, it is not necessary to require any further documentation submittal to the FHWA. The rule has been revised to delete this requirement.

No other changes to the rule are being proposed or appear to be warranted.

Therefore, based on a further review and with consideration given to the comments submitted to the public docket, the revisions, as proposed and further modified to the extent discussed above, are adopted in this final rule.

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 nor a significant regulation under the regulatory policies and procedures of the Department of Transportation. Only minimal impact on the affected States and public would be expected. Any additional costs would be more than offset by the potential savings in Federal-aid funds created by the avoidance of bid collusion. For the foregoing reasons and under the criteria of the Regulatory Flexibility Act, it is hereby certified that this action will not have a significant impact on a substantial number of small entities and that the preparation of a full regulatory evaluation is not required.

In consideration of the foregoing, the FHWA hereby amends Part 635, Subpart A of Chapter I of Title 23, Code of Federal Regulations, by revising § 635.107 to read as set forth below.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**List of Subjects in 23 CFR Part 635**

Bidding procedures, Government contracts, Grants programs—Transportation, Highways and roads.

Issued on: July 25, 1986.

R.A. Barnhart,

*Federal Highway Administrator, Federal Highway Administration.*

**PART 635—CONSTRUCTION AND MAINTENANCE**

**Subpart A—Contract Procedures [Amended]**

The FHWA hereby amends Part 635, Subpart A of Chapter I of Title 23, Code of Federal Regulations, as follows:



1. The authority citation for Part 635 is revised to read as follows:

Authority: 23 U.S.C. 112, 113, 114, 117, 128, and 315; 31 U.S.C. 6506; 42 U.S.C. 3334, 4601 *et seq.*; 49 CFR 1.48(b).

2. Section 635.107(i) is revised to read as follows:

**§ 635.107 Advertising for bids.**

(i) The State highway agency shall include a statement substantially as follows in the advertised specifications:

Each bidder shall file a sworn statement executed by, or on behalf of the person, firm, association, or corporation submitting the bid, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action, in restraint of free competitive bidding in connection with the submitted bid. This sworn statement shall be in the form of an affidavit executed and sworn to by the bidder before a person who is authorized by the laws of the State to administer oaths. The required form for the affidavit will be provided by the State to each prospective bidder. Failure to submit the sworn statement as part of the bid approval package will make the bid nonresponsive and not eligible for award consideration.

[FR Doc. 86-17327 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-22-M

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1952

#### Approved State Plans for Enforcement of State Standards Approval of Supplement to the California State Plan

**AGENCY:** Occupational Safety and Health Administration, Labor.

**ACTION:** Final rule; Approval of Supplement to the California State Plan.

**SUMMARY:** This document gives notice of Federal approval of a State plan supplement concerning California's Cooperative Self-Inspection Program.

**EFFECTIVE DATE:** August 1, 1986.

**FOR FURTHER INFORMATION CONTACT:** James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, Room N3637, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Telephone (202) 523-8148.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The California Occupational Safety and Health Plan was approved under

section 18(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667(c)) (hereinafter referred to as the Act) and 29 CFR Part 1902 on May 1, 1973 (38 FR 10717). Part 1953 of this Chapter provides procedures for the review and approval of State change supplements by the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter referred to as the Assistant Secretary).

#### B. Description of Supplement

On February 28, 1985, Ron Rinaldi, Director, California Department of Industrial Relations, submitted a plan change supplement concerning California's Cooperative Self-Inspection Program (CSIP). In response to Federal review and to internal State evaluation, the State made changes in its program and submitted a revised supplement on December 11, 1985. The State's CSIP is comparable to the Federal Voluntary Protection Programs as described in the Federal Register on July 2, 1982 (47 FR 29025). CSIP's purpose is to improve safety and health conditions through a cooperative approach. Workplaces participating in CSIP are removed from scheduled inspection lists, although inspections are still conducted in response to employee complaints or accidents. A non-enforcement State representative will be assigned to each participating site as a resource person.

In order to be approved for CSIP, an employer must meet several requirements. The employer's history of inspections and abatement must indicate good faith attempts to improve safety and health conditions. Employers must agree to correct all hazards in a timely manner. When a site has a significant portion of its employees organized by one or more collective bargaining agents, the recognized agent(s) must either sign the application or submit a signed statement expressing no opposition to participation in the program. Employers must assure that employees will not be discriminated against for exercising their occupational safety and health rights, including participation in CSIP activities such as labor-management committees. There are also specific requirements for participation in each of the State's two CSIP programs, Cal/Star (comparable to the Federal Star program) and Reach (comparable to the Federal Try program).

The Cal/Star Program's purpose is to recognize leaders in occupational safety and health programs who have been successful in reducing workplace hazards and to encourage others to work toward similar levels of success. The term for participation in the Cal/

Star program is unlimited, contingent upon continued favorable review of injury/illness incidence rates, and lost workday rates and on-site evaluation of all program elements every three years. In the construction industry, participation ends with the completion of construction work at the site.

An applicant must have had a minimum of one year's operational experience with a safety and health program which meets the Cal/Star requirements. Qualification for Cal/Star participation include: a demonstrated top-level commitment to occupational safety and health; injury and illness rates below a specified level; access to professional expertise; line accountability; job hazard review, and a written safety and health program which includes routine self-inspections, safety and health training, and program evaluation. Construction sites must utilize the labor-management committee approach to the identification and correction of hazards, while general industry sites must have either a labor-management committee or an equally effective means of employee participation.

The Reach Program is aimed at employers in any industry who have not yet met the qualifications for the Cal/Star Program but who wish to work toward Cal/Star participation. A Reach Program will be approved for a period of time agreed upon in advance of approval. The term will be dependent upon how long it is expected to take the applicant to accomplish the goals for Cal/Star participation. Participation will be cancelled at the end of the term.

An eligible applicant for participation in the Reach Program must have certain program elements operational or, at a minimum, in place and ready for implementation by the date of approval. These include: top-level management commitment to occupational safety and health; specified injury and illness rates; access to professional expertise; and a written safety and health program. Improvements in any of these areas which are not of Cal/Star quality, as well as the other requirements for Cal/Star, must be set as program goals.

Although this general plan supplement was submitted in response to a Federal program change set out in OSHA Instruction CPL 5.1 CH-1 (November 7, 1983), Voluntary Protection Programs, the State had previously instituted pilot projects at several worksites incorporating some of the features now contained in the CSIP. The sites for pilot projects included: Bechtel Power Corporation, San Onofre Nuclear Generating Station, San Clemente;



Hensel Phelps Construction Company, IBM Construction Project, San Jose; Martin Marietta Aluminum Plant, Torrance (ongoing). Establishments currently participating in the CSIP include the Pepsi Cola Bottling Plant in Fresno, and Bechtel Construction, Union Oil Refinery in Rodeo (Cal/Star), and FMC Chemical Plant of Fresno and Fletcher Oil Refinery in Carson (Reach).

#### C. Location of Supplement for Inspection and Copying

A copy of the State plan supplement on the California Cooperative Self-Inspection Program may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, Occupational Safety and Health Administration, 11349 Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102; California Division of Occupational Safety and Health, Room 701, 525 Golden Gate Avenue, San Francisco, California 94102; and Director, Federal State Operations, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3476, 200 Constitution Avenue N.W., Washington, D.C. 20210.

#### D. Public Participation

Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for any other good cause which may be consistent with applicable law. The Assistant Secretary finds that the State's Cooperative Self-Inspection Program is substantially similar to the Occupational Safety and Health Administration's Voluntary Protection Programs, meets Federal requirements and was adopted by the State after opportunity for input from interested parties. Good cause is therefore found for approval of this supplement and further public participation would be unnecessary.

#### E. Decision

After careful consideration, the California plan supplement described above is found to be in accordance with Federal requirements and is hereby approved under Part 1953 of this Chapter. This decision incorporates the requirements of the Act and implementing regulations applicable to State plans generally.

#### F. List of Subjects in 29 CFR Part 1952

Occupational safety and health.

Signed this 28 day of July, 1986, in Washington, D.C.

John A. Pendergrass,  
Assistant Secretary of Labor.

#### PART 1952—[AMENDED]

Accordingly 29 CFR Part 1952 is hereby amended as follows:

1. The authority citation for Part 1952 is revised to read as follows:

Authority: Secs. 8, 18, Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 667); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059) or 9-83 (48 FR 35736).

2. Section 1952.175 is amended by adding paragraph (h) to read as follows:

#### § 1952.175 Changes to approved plans.

\* \* \* \* \*

(h) In accordance with Subparts C and E of Part 1953 of this chapter, the California Cooperative Self-Inspection Program was approved by the Assistant Secretary on August 1, 1986.

[FR Doc. 86-17363 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-26-M

#### DEPARTMENT OF DEFENSE

##### Department of the Navy

#### 32 CFR Part 706

#### Certifications and Exemptions Under the International Regulations For Preventing Collisions at Sea, 1972; Amendment

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

**SUMMARY:** The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Secretary of the Navy has determined that USS BAINBRIDGE (CGN 25) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with 72 COLREGS without interfering with its special function as a naval cruiser. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

**EFFECTIVE DATE:** July 16, 1986.

**FOR FURTHER INFORMATION CONTACT:** Captain P.C. TURNER, JAGC, U.S. Navy, Admiralty Counsel, Office of the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400, Telephone number: (202) 325-9744.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR Part 706. This amendment provides notice that the Secretary of the Navy has certified that USS BAINBRIDGE (CGN 25) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with 72 COLREGS: Annex I, section 3(a), pertaining to the location of the forward masthead light in the forward quarter of the ship, and Annex I, section 3(a), pertaining to the horizontal distance between the forward and aft masthead lights. Full compliance with the above-mentioned 72 COLREGS provisions would interfere with the special function and purpose of the vessel. The Secretary of the Navy has also certified that the above-mentioned lights are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

#### List of Subjects in 32 CFR Part 706

Marine safety, Navigation (Water), Vessels.

#### PART 706—[AMENDED]

Accordingly, 32 CFR Part 706 is amended as follows:

1. The authority citation for 32 CFR Part 706 continues to read:

Authority: 33 U.S.C. 1605.

#### § 706.2 [Amended]

1. Table Five of § 706.2 is amended by adding the following vessel:



Vessel	Number	Forward masthead light less than the required height above hull. Annex I, sec. 2(a)(i)	Aft masthead light less than 4.5 meters above forward masthead light. Annex I, sec. 2(a)(ii)	Masthead lights not over all other lights and obstructions. Annex I, sec. 2(f)	Vertical separation of masthead lights used when towing less than required by Annex I, sec. 2(a)(i)	Aft masthead lights not visible over forward light 1,000 meters ahead of ship in all normal degrees of trim. Annex I, sec. 2(b)	Forward masthead light not in forward quarter of ship. Annex I, sec. 3(a)	After masthead light less than 1/2 ship's length aft of forward masthead light. Annex I, sec. 3(a)	Percentage horizontal separation attained
U.S.S. BAINBRIDGE .....	CGN 25	N/A	N/A	N/A	N/A	N/A	×	×	19

Dated: July 16, 1986.

John Lehman,

Secretary of the Navy.

[FR Doc. 86-17367 Filed 7-31-86; 8:45 am]

BILLING CODE 3810-AE-M

### 32 CFR Part 706

#### Certifications and Exemptions Under the International Regulations For Preventing Collisions at Sea, 1972; Amendment

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Secretary of the Navy has determined that USS GRIDLEY (CG 21) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with 72 COLREGS without interfering with its special function as a naval cruiser. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

**EFFECTIVE DATE:** July 16, 1986.

#### FOR FURTHER INFORMATION CONTACT:

Captain P.C. Turner, JAGC, U.S. Navy, Admiralty Counsel, Office of the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400, Telephone number: (202) 325-9744.

#### SUPPLEMENTARY INFORMATION:

Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR Part 706. This amendment provides notice that the Secretary of the Navy has certified that USS GRIDLEY (CG 21) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with 72 COLREGS: Annex I, section 3(a), pertaining to the location of the forward masthead light in the forward quarter of the ship, and Annex I, section 3(a), pertaining to the horizontal distance between the forward and aft masthead lights. Full compliance with the above-mentioned 72 COLREGS provisions would interfere with the special function and purpose of the vessel. The Secretary of the Navy has also certified that the above-mentioned lights are located in closest possible compliance with the applicable 72 COLREGS requirements.

Notice is also provided to the effect that USS GRIDLEY (CG 21) is a member of the CG 16 class of vessels for which

certain exemptions, pursuant to 72 COLREGS, Rule 38, have been previously authorized by the Secretary of the Navy. The exemptions pertaining to that class, found in the existing tables of § 706.3, are equally applicable to USS GRIDLEY (CG 21).

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

#### List of Subjects in 32 CFR Part 706

Marine safety, Navigation (Water), Vessels.

#### PART 706—[AMENDED]

Accordingly, 32 CFR Part 706 is amended as follows:

1. The authority citation for 32 CFR Part 706 continues to read:

Authority: 33 U.S.C. 1605.)

#### § 706.2 [Amended]

1. Table Five of § 706.2 is amended by adding the following vessel:

Vessel	Number	Forward masthead light less than the required height above the hull. Annex I, sec. 2(a)(i)	Aft masthead light less than 4.5 meters above forward masthead light. Annex I, sec. 2(a)(ii)	Masthead lights not over all other lights and obstructions. Annex I, sec. 2(f)	Vertical separation of masthead lights used when towing less than required by Annex I, sec. 2(a)(i)	Aft masthead lights not visible over forward light 1,000 meters ahead of ship in all normal degrees of trim. Annex I, sec. 2(b)	Forward masthead light not in forward quarter of ship. Annex I, sec. 3(a)	After masthead light not less than 1/2 ship's length aft of forward masthead light. Annex I, sec. 3(a)	Percentage horizontal separation attained
U.S.S. GRIDLEY .....	CG21	N/A	N/A	N/A	N/A	N/A	×	×	29



Dated: July 16, 1986.

John Lehman,

Secretary of the Navy.

[FR Doc. 86-17366 Filed 7-31-86; 8:45 am]

BILLING CODE 3810-AE-M

## COPYRIGHT ROYALTY TRIBUNAL

### 37 CFR Part 306

#### Cost of Living Adjustment of the Royalty Rate for Performance of Musical Compositions on Coin-Operated Phonorecord Players

**AGENCY:** Copyright Royalty Tribunal.

**ACTION:** Final rule.

**SUMMARY:** The Copyright Royalty Tribunal announces a cost of living adjustment of the royalty rate for performance of musical compositions on jukeboxes. The annual compulsory license fee is increased to \$63. The adjustment is being made in accordance with § 306.4 of the Tribunal's rules.

**EFFECTIVE DATE:** January 1, 1987.

#### FOR FURTHER INFORMATION CONTACT:

Edward W. Ray, Chairman, Copyright Royalty Tribunal, 1111 20th Street NW., Washington, DC 20036, (202) 653-5175.

**SUPPLEMENTARY INFORMATION:** In 1980, the Copyright Royalty Tribunal conducted a proceeding to adjust the compulsory license fee for the performance of musical compositions on coin-operated phonorecord players (jukeboxes). *1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players*, 46 FR 890 (January 5, 1981). The Tribunal determined that a \$50 annual fee was reasonable. However, in order to ease the impact of the rate increase upon the jukebox industry, the Tribunal elected to stagger the introduction of the rate. For two years, 1982 and 1983, the rate was \$25. Thereafter, the rate became \$50.

The Tribunal further determined that because the \$50 rate could not, under the Copyright Act, be reviewed until 1990, that the copyright owners might not be fairly compensated unless a provision was included to allow for an adjustment for inflation.

Accordingly, the Tribunal adopted provisions for a one-time inflation adjustment, § 306.4, which reads, "(a) On August 1, 1986, the Copyright Royalty Tribunal (CRT) shall publish in the *Federal Register* a notice of the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items) from the first Index published subsequent to February 1, 1981 to the last Index published prior to August 1, 1986. (b) On

the same date as the notices published pursuant to paragraph (a), the CRT shall publish in the *Federal Register* a revised schedule of the compulsory license fee which shall adjust the dollar amount set forth in § 306.3(b) according to the change in the cost of living determined as provided in paragraph (a). Such compulsory license fee shall be fixed at the nearest dollar. (c) The adjusted schedule for the compulsory license fee shall become effective on January 1, 1987."

Accordingly, it is announced that the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items) for the Index published July 23, 1986 to the last Index published prior to February 1, 1981 is 25.9% (June 1986's Index, published July 23, 1986 was 327.9. The Last Index published prior to February 1, 1981 was 260.5). The jukebox compulsory license fee shall be adjusted upward from \$50 to \$63 annually. Sections 306.3 and 306.4 are revised as shown below.

#### List of Subjects in 37 CFR Part 306

Copyright, Jukeboxes, Music.

#### PART 306—[AMENDED]

1. The authority citation for Part 306 continues to read as follows:

**Authority:** 17 U.S.C. 801(b)(1); 17 U.S.C. 804(a)(2)(C).

37 CFR Part 306.3 is revised to read as follows:

#### § 306.3 Compulsory license fee for coin-operated phonorecord players.

(a) Commencing January 1, 1982, the annual compulsory license fee for a coin-operated phonorecord player shall be \$25.

(b) Commencing January 1, 1984, the annual compulsory license fee for a coin-operated phonorecord player shall be \$50.

(c) Commencing January 1, 1987, the annual compulsory license fee for a coin-operated phonorecord player shall be \$63.

(d) If performances are made available on a particular coin-operated phonorecord player for the first time after July 1 of any year, the compulsory license fee for the remainder of that year shall be one half of the annual rate of (a), (b), or (c) of this section, whichever is applicable.

#### § 306.4 [Removed]

37 CFR Part 306.4 is removed.

Dated: July 28, 1986.

Edward W. Ray,

Chairman.

[FR Doc. 86-17190 Filed 7-31-86; 8:45 am]

BILLING CODE 1410-01-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[A-1-FRL-3053-4]

#### Approval and Promulgation of Implementation Plans; Rhode Island; Temporary Sulfur-in-Fuel Revision for Seville Dyeing Corporation, Woonsocket

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is today approving a revision to the Rhode Island State Implementation Plan (SIP) which will allow Seville Dyeing Corporation in Woonsocket, Rhode Island to increase the sulfur content of its residual fuel oil for up to 30 months. The burning of less expensive, higher sulfur content fuel oil will provide this source with some of the capital it has expended to implement permanent energy conservation measures.

**EFFECTIVE DATE:** August 1, 1986.

**ADDRESSES:** Copies of the Rhode Island submittal, which is incorporated by reference, are available for public inspection during regular business hours at the Environmental Protection Agency, Region I, Room 2313, JFK Federal Building, Boston, Massachusetts 02203; Public Information Reference Unit, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, DC; and the Division of Air and Hazardous Materials, Department of Environmental Management, 75 Davis Street, Cannon Building, Room 204, Providence, Rhode Island 02908.

**FOR FURTHER INFORMATION CONTACT:** David B. Conroy, (617) 223-4869.

**SUPPLEMENTARY INFORMATION:** On December 16, 1985 and January 23, 1986, the Rhode Island DEM submitted a SIP revision for Seville Dyeing Corporation, in Woonsocket, Rhode Island. The revision allows the burning of 2.2% sulfur fuel in their boilers for 30 months or less. The facility will use the savings realized during the temporary (30 months or less) utilization of less expensive 2.2% sulfur fuel oil to pay back the costs which were expended to



implement the permanent energy conservation measures. The facility will return to burning 1.0% sulfur fuel oil by February 1, 1989 or, if within the 30 month period, the savings realized from burning high sulfur oil equals or exceeds \$80,750.00.

#### Background

This temporary sulfur-in-fuel revision is being approved pursuant to the provisions of Rhode Island Regulation No. 8, Subsection 8.3.3, "Conversion and Conservation Incentive." EPA approved the addition of this regulation to the Rhode Island SIP on March 29, 1983, (48 FR 13026). It specifies the requirements and conditions which sources must meet in order to qualify for temporary sulfur-in-fuel relaxations and the procedures which the Rhode Island Department of Environmental Management (DEM) must use to determine that the emissions will not violate any National Ambient Air Quality Standards (NAAQS). Only sources rated at less than 250 million Btu per hour heat input, which are currently burning residual fuel oil, and have made a commitment to either (a) convert to an alternate fuel, or (b) implement conservation measures, are eligible for a temporary sulfur-in-fuel revision not to exceed 30 months. Further details on the requirements of Rhode Island Regulation No. 8, Subsection 8.3.3 and EPA's reasons for approving it were discussed in a Notice of Proposed Rulemaking (NPR) published on January 4, 1983 (48 FR 274). In the NPR, EPA also proposed approval of all individual sources that meet the eligibility requirements of this regulation.

#### EPA Evaluation

EPA has determined that the DEM has approved Seville Dyeing Corporation's request to burn higher sulfur fuel oil in accordance with the provisions of Rhode Island Regulation No. 8, Subsection 8.3.3, and agrees that no air quality standards will be violated by the temporary burning of 2.2% sulfur fuel oil at this facility.

EPA received no comments on its January 4, 1983 (48 FR 274) proposal to approve individual sources of sulfur-in-fuel relaxations, and the DEM has satisfactorily responded to the comments it received on its proposed approval of the temporary sulfur-in-fuel relaxation at the Seville Dyeing Corporation, in Woonsocket. Since the public has had these other opportunities to comment, and since the Seville Dyeing Corporation facility is a small source (each piece of equipment is less than 250 million Btu per hour heat input), EPA is taking final action today to

approve this SIP revision without first publishing a new proposed rulemaking. EPA believes that publishing a new NPR is unnecessary. EPA finds good cause for making this action effective immediately because the implementation plan is already in effect under State law and imposes no additional regulatory burden.

#### Final Action

EPA is approving the proposed temporary sulfur-in-fuel relaxation revision for Seville Dyeing Corporation.

Under 42 U.S.C. 605(b), the Administrator has certified that this action will not have significant economic impact on a substantial number of small entities (see 46 FR 8709).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 30, 1986. This action may not be challenged later in proceedings to enforce its requirements (see 307(b)(2)).

#### List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, and Hydrocarbons, Intergovernmental relations, Reporting and Recordkeeping requirements.

Note.—Incorporation by Reference for the State Implementation Plan for the State of Rhode Island was approved by the Director of the Federal Register on July 1, 1982.

Dated: July 14, 1986.

Lee M. Thomas,  
Administrator.

#### PART 52—[AMENDED]

Part 52, Chapter 1, Title 40 of the Code of Federal Regulations is amended as follows:

#### Subpart 00—Rhode Island

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

#### § 52.2070 [Amended]

2. Section 52.2070 is amended by adding paragraph (c)(25) as follows:

#### § 52.2070 Identification of Plan

(c) \* \* \*

(25) A revision submitted on December 16, 1985 and January 23, 1986 allowing the burning of 2.2% sulfur content fuel oil at the Seville Dyeing Corporation facility in Woonsocket, Rhode Island for a period of up to 30 months, commencing on August 1, 1986, the savings from which will be used to pay for permanent energy conservation measures to reduce on-site consumption of petroleum products by at least 50,000 gallons per year (estimated 250,000 gallons per year).

(i) *Incorporation by reference.* (A) Letter from Doug L. McVay, Principal Engineer, to Seville Dyeing Corporation, dated December 16, 1985 allowing the temporary use of less expensive 2.2% sulfur fuel oil until February 1, 1989. At the end of the temporary use period, Seville Dyeing Corporation will return to the use of 1.0% sulfur fuel oil. The particulate emission rate for the facility will not exceed 0.15 lbs per million Btu.

(B) Letter to Louis F. Gitto, Director of Air Management Division, EPA Region I from Thomas D. Getz, Director of Air & Hazardous Materials, RI DEM dated January 23, 1986; subject: Response to EPA questions regarding Seville Dyeing Corporation, and outline of the permanent energy conservation measures to be used.

#### § 52.2081 [Amended]

3. Section 52.2081 is amended by adding the following line to the table of EPA Approved Regulations:

#### § 52.2081 EPA-Approved. EPA Rhode Island State regulations.

TABLE 52.2081.—EPA-APPROVED RULES AND REGULATIONS

State Citation	Title/subject	Date adopted by State	Date approved by EPA	F.R. citation	52.2070	Comments/unapproved sections
No. 8	Sulfur Content of Fuels.	12/16/85	See note below.	See note below.	(c)(25)	Temporary relaxation for Seville Dyeing Corporation in Woonsocket



[FR Doc. 86-16387 Filed 8-1-86; 8:45 am]  
BILLING CODE 6560-50-M

## GENERAL SERVICES ADMINISTRATION

### 41 CFR Part 101-40

[FPMR Amdt. G-79]

## Transportation and Traffic Management

### Correction

In FR Doc. 86-15005 beginning on page 24329 in the issue of Thursday, July 3, 1986, make the following corrections:

1. On page 24329, in the third column in the **SUPPLEMENTARY INFORMATION**, eighth line from the bottom, the first word should read "Administrative";

#### § 101-40.101-1 [Corrected]

2. On page 24331, in the second column, in § 101-40.101-1(a), sixth line, the first word should read "contacting";

3. On the same page in the same section, in the table, in the second column, Region 5, "NM" should read "MN";

#### § 101-40.103-2 [Corrected]

4. On the same page, in the third column, in § 101-40.103-2(b), seventh line, "Pub. L. 96-623" should read "Pub. L. 93-623";

#### § 101-40.103-3 [Corrected]

5. On page 24332, in the first column, in § 101-40.103-3, fifteenth line, "807" should read "808";

#### § 101-40.206 [Corrected]

6. On page 24334, in the third column, in § 101-40.206 introductory text, fifteenth line, insert "how" after "about";

#### § 101-40.301 [Corrected]

7. On page 24335, in the third column, in § 101-40.301(a), in the "Note" following the table, third line, "as" should read "so";

8. On page 24336, in the first column, in § 101-40.301(b)(1), last line, "conterminous" was misspelled;

#### § 101-40.404-1 [Corrected]

9. On page 24338, in the second column, in § 101-40.404-1(b), third line, the first word should read "officer";

#### § 101-40.404-3 [Corrected]

10. On the same page, third column, amendatory instruction 55 should read

"Section 101-40.404-3 is removed and the section is reserved.";

#### § 101-40.408-3 [Corrected]

11. On page 24339, in the third column, in § 101-40.408-3(c)(2)(iii), fourth line, "proposed" was misspelled;

#### § 101-40.409-1 [Corrected]

12. On page 24340, in the second column, in § 101-40.409-1(c), fourth line, "for" should read "or";

#### § 101-40.702-3 [Corrected]

13. On page 24341, in the second column, in § 101-40.702-3(a), sixth line, the first word should read "lading";

14. On the same page, in the third column, in § 101-40.702-3(d), eleventh line, the first word should read "addressees"; and

#### § 101-40.703-2 [Corrected]

15. On page 24342, in the first column (§ 101-40.703-2(a)), sixth line, the section number should read "§ 101-40.702-1(b)";

#### § 101-40.703-3 [Corrected]

16. On the same page, in the first column, in § 101-40.703-3(a), 37th line, the section number should read "§ 101-40.703-2(c)";

17. On the same page and column, in § 101-40.703-3(b), third line, "as" should read "at"; and

#### § 101-40.710 [Corrected]

18. On page 24343, in the first column, in § 101-40.710(a), fourteenth line, the section number should read "§ 101-40.711".

BILLING CODE 1505-02-M

## LEGAL SERVICES CORPORATION

### 45 CFR Part 1612

## Restrictions on Lobbying and Certain Other Activities

**AGENCY:** Legal Services Corporation.

**ACTION:** Final rule.

**SUMMARY:** On February 21, 1986, LSC's Board of Directors approved a new version of Part 1612 of its regulations for final publication. In revising Part 1612, it has been the purpose of the Board, consistent with Congressional intent, to remove restrictions on what programs can do in *bona fide* representation of eligible clients. The Board also believed that more stringent regulations were necessary in areas peripheral to the

responsibilities of legal services programs, such as publications, training, grassroots lobbying, dues paying, and organizing. Finally, the Board sought to streamline Part 1612 by a threefold approach: Expanding the definition section; dividing old § 1612.5; and treating all LSC-derived funds consistently. Congress has been given the fifteen-day notice required by Section 606 of Public Law 99-180. This version of Part 1612 will go into effect thirty days after publication in the Federal Register.

**EFFECTIVE DATE:** September 2, 1986.

#### FOR FURTHER INFORMATION CONTACT:

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**SUPPLEMENTARY INFORMATION:** On February 24, 1984, LSC published in the Federal Register (49 FR 6943) a proposed rule revising Part 1612—Restrictions on Certain Activities. Interested parties were given 30 days, until March 26, 1984, in which to submit comments. A total of 218 comments was received and considered. Of these comments, 144 were received within the comment period; the remainder were received thereafter. Of the comments, 56 were from programs funded by LSC; 13 from Congress; 20 from bar associations; 20 from state officials; 63 from legal and political foundations and coalitions; 12 from government agencies; and 34 from private attorneys, firms, and citizens.

Part 1612 was originally adopted by LSC's Board of Directors on April 28, 1984, and published in final form in the Federal Register on May 31, 1984 (49 FR 22651). That version of the regulation is currently in effect. On January 4, 1985, the Legal Services Corporation republished Part 1612 of its regulations for comment (50 FR 501). Numerous comments were received and considered. On February 20, 1986, the Operations and Regulations Committee of the Board of Directors approved a new Part 1612, and the Board approved a modified version the next day. Congress has been given fifteen days' notice, as required by Section 606 of Public Law 99-180. Part 1612 will go into effect thirty days after publication in the Federal Register.

The principle that guided creation of this new version is whether changes would affect a *bona fide* attorney/client relationship. It has been the purpose of



the Board, consistent with Congressional intent, to remove restrictions on what programs can do in *bona fide* representation of eligible clients. At the same time, greater stringency was appropriate to areas that are peripheral to the responsibilities of legal services programs, such as publications, training, grassroots lobbying, dues paying, and organizing.

Three changes in approach have allowed the Board to streamline Part 1612: expanding the definition section; splitting up old § 1612.5; and treating all LSC-derived funds in the same fashion. The first and perhaps the most significant change in the new version is the expansion of the definition section. Where before only two terms, "legal assistance activities" and "legislation" were defined, definitions are now supplied for all the major terms used in Part 1612. Defining these terms at the outset avoids much of the confusing repetition of statutory language that made the old version difficult to follow.

In the old version of the regulation, § 1612.5 was a catchall section that lumped together all the major provisions concerning lobbying. Section 1612.5 dealt not only with prohibitions on legislative, administrative, and grassroots lobbying, but also with permissible activities (representing clients and appearing before elected officials upon request) and with various liaison activities. All of these activities are now treated in separate sections of Part 1612.

Besides lumping most of the provisions concerning lobbying into one section, the other feature that made the old version confusing was the necessity of distinguishing among different kinds of funds. Some funds were controlled by the provisions of the Act and others by the provisions of various appropriation riders. Differing treatment of "red," "blue," and "green" dollars is no longer necessary, however, after passage last year of section 112 of Pub. L. 99-180, 99 Stat. 1185, which makes the provisions of the current appropriation rider applicable to all funds derived from LSC.

Finally, the sections of the regulation have been placed in what, it is hoped, is a more logical order. In the old regulation, the restrictions on "certain other activities" (public demonstrations and activities, organizing, and training) were placed before the restrictions on lobbying. Then came the catchall section, § 1612.5, followed by two sections dealing with lobbying under Public Law 98-166 and, finally, the enforcement provision and a provision requiring posting of notices. The new version starts with lobbying and then

treats other activities. It moves from the general prohibition on lobbying to various exceptions to the prohibition. Thus, after a definition section, and a section on legal assistance activities (§ 1612.2), § 1612.3 deals with legislative activities in general and § 1612.4 sets forth the general prohibition against legislative and administrative lobbying. Sections 1612.5 and 1612.6 then set forth the two major exceptions to the prohibition of lobbying: activities on behalf of eligible clients and activities undertaken pursuant to the request of public officials. Section 1612.7 sets forth the prohibition on grassroots lobbying and §§ 1612.8, 1612.9, and 1612.10 deal, respectively, with public demonstrations and activities, training, and organizing. Finally, § 1612.11 deals with accounting and timekeeping, § 1612.12 with enforcement, and § 1612.13 with certain uses of private funds. The old provision requiring posting of notices has been dropped. The significant changes effected by the regulation are summarized below.

#### Section 1612.1 Definitions.

The term "adjudicatory proceeding" is defined in paragraph (a) as a "proceeding . . . which makes a determination that is of particular rather than general applicability." It is used in § 1612.5(a); in § 1612.9(c); and in § 1612.11. This definition is derived from a number of sources. The definition of the term "adjudication" in its broadest sense is "an agency determination of particular rather than general applicability that affects private rights or interests." See 4 Mezones, Stein, & Gruff, *Administrative Law* § 31.01 (1985.) The Administrative Procedure Act defines "adjudication" as an "agency process for the formulation of an order" (5 U.S.C. 551(7)) and defines "order" as the "whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, in a matter other than rulemaking but including licensing" (5 U.S.C. 551(6)). The list of organizations used in this definition—"Federal, State, or local agency, commission, authority or government corporation"—is from old § 1612.6, which was entitled "Administrative Representation under Pub. L. 98-166." In employing this definition, the Board does not ignore that an individual adjudication may have precedential value and thus, in some sense, general applicability. The definition is intended only to distinguish adjudication from rulemaking. An individual adjudication may turn out to be a test case and may have broad ramifications, but it still focuses on a particular matter. The words "federal,

state, or local" as used throughout Part 1612 are intended to modify each of the words "agency, commission, authority, or government corporation." Thus the regulation refers to federal, state, or local government commissions, and federal, state, or local government authorities. The words "agency, commission, authority, or government corporation" are used to clarify that the regulation applies to any entity exercising governmental authority, whatever its name. "Government corporations," although not specifically mentioned in the statute, are treated as agencies.

The term "administrative lobbying" is defined in paragraph (b) and is used in § 1612.1 (c), (g), (j), and (k); in § 1612.4(b); and in § 1612.12. The definition tracks the language of the second paragraph of Pub. L. 99-180, the appropriation rider. The first clause of that paragraph provides that none of the funds appropriated in the Act for the Legal Services Corporation may be used "[t]o pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or other device, intended or designed to influence any decision by a Federal, State or local agency." For the sake of clarifying the scope of the word "agency", several additions were made to the language of the rider, including insertion of the word "official" before the word "agency" and insertion of the words "commission, authority, or government corporation" after the word "agency."

The term "administrative representation" is defined in paragraph (c) and is used in § 1612.3 (c) and (f) and in § 1612.5 (a) and (d). In the past some have incorrectly used the word "representation" as a euphemism for "lobbying" and have spoken as if all of Part 1612 dealt with various forms of representation. Representation, however, includes only activities conducted on behalf of particular clients. It does not include such activities as those conducted pursuant to the request of a legislator. The new definitions of "administrative representation" and of "legislative lobbying", accordingly, recognize that the word "representation" can accurately describe only activities conducted on behalf of particular clients.

The term "grassroots lobbying" is defined in paragraph (d) and is used in § 1612.1 (g) (j), and (k) and in § 1612.7(a). The definition tracks the language of the first paragraph of Pub. L. 99-180, the appropriation rider. That paragraph provides that none of the funds



appropriated in the Act for the Legal Services Corporation may be used "[t]o pay for any publicity or propaganda intended or designed to support or defeat legislation pending before Congress or State or local legislative bodies or intended or designed to influence any decision by a Federal, State, or local agency." For the sake of clarity the words "county, or municipal legislative bodies, including any commission, authority, or government corporation with rulemaking authority," have been substituted for the words "local legislative bodies." For the same reason the words "county, or municipal administrative body" have been substituted for the words "local agency." The words "or intended or designed to influence any decision by the electorate on a measure submitted to it for a vote" are added to enforce the provisions of the Act prohibiting the use of Corporate funds to influence the passage or defeat of State proposals by initiative petition (section 1007(a)(5) of the Act) and the provisions of Pub. L. 97-377 prohibiting the use of Corporate funds to influence elected officials to favor or oppose "any referendum, initiative, [or] constitutional amendment."

The term "legal assistance activities" is defined in paragraph (e) and is used in § 1612.2 and in § 1612.8 (a) and (b). The term "legal assistance" is used in § 1612.5(b); in § 1612.6(a); in § 1612.9 (b) and (b)(1); and in § 1612.10(b). Under the new definition three types of activities qualify as legal assistance activities: first, activities carried out during working hours or while on official travel; second, activities using resources provided by the Corporation or a recipient, directly or through a subrecipient; and third, activities that, in fact, provide legal advice or representation to an eligible client. The Corporation has the responsibility to track and regulate the use of the federal dollars that have been allocated to it. Clearly this responsibility included the duty to regulate how LSC money is used for travel. Accordingly, this definition has been written so that any activities engaged in by an employee on official travel fall within the scope of regulated "legal assistance activities." The Board believes, for instance, that, if provider personnel come to Washington, D.C., using Corporate funds and spend three-fourths of their time lobbying, they should not be able to escape the strictures of Part 1612 by claiming that they lobbied on their own time or during "off hours." It is important to note that this paragraph does not prevent provider personnel—or anyone else—

from coming to Washington at their own expense and then doing whatever they please. It regulates only activities that are supported in whole or in part by regulated funds. Also, this section does not prohibit a staff member on an official trip from staying over, say, to visit friends. The problem addressed is the use of public funds to facilitate political activity, not time spent on activities that are personal in nature.

The term "legislation" is defined in paragraph (f) and is used in § 1612.1 (d), (h)(1), (j), (m), and (n); in § 1612.5(c); in § 1612.6 (a), (b), (b)(2), (b)(5), and (c); in § 1612.7 (b), (b)(2), and (b)(5); and in § 1612.9(a)(2). The definition expands upon the definition that appeared in old § 1612.1(b). The older definition was circular: "legislation" was "any action of . . . [a] body . . . acting in a legislative capacity." The words "acting in a legislative capacity" have been eliminated and materials from two other sources have been used to make the definition clearer. First, language has been taken from Webster's *Third New International Dictionary* (1971), where "legislation" is defined as "the exercise of the power and function of making rules (as laws, ordinances . . . edicts) having force and authority by virtue of their promulgation by an official organ of a state or other organization." Second, language has been borrowed from the Administrative Procedure Act which defines "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." Administrative rulemaking is included within the category of legislation because legislation and rulemaking are essentially the same in character. In recognition of the fact that the appropriation rider treats rulemaking differently from other forms of legislation, however, a separate provision dealing with rulemaking has been included later in § 1612.5(b). As in prior versions of Part 1612, the definition of legislation specifically lists the following as examples of legislation: Action on constitutional amendments, treaties and intergovernmental agreements, approval of appointments or of budgets proposed by an executive branch official, simple resolutions not having the force of law, and approval or disapproval of execution action. This list is not exhaustive. Indian Tribal Councils are not to be considered as legislatures for the purpose of Part 1612.

The term "legislative activities" is defined in paragraph (g) and is used in

§ 1612.3 (a), (b), (d), (f), and (g); in § 1612.9(c); and in § 1612.11 (a) and (b). It is a broad term and encompasses administrative, legislative, and grassroots lobbying as well as liaison activities.

The term "legislative lobbying" is defined in paragraph (h) and is used in § 1612.1 (g), (i), (j), and (k); in § 1612.4 (a) and (b); and in § 1612.13. The definition tracks language contained in Pub. L. 99-180, the appropriation rider. Paragraph (h)(1) of the definition is derived verbatim from the rider as are paragraphs (h) (2), (3), and (4). Paragraph (h)(2) of the definition carries forward the language of former § 1612.7(a)(1) and defines the term "similar procedure" as legislative consideration of matters relating to the structure of government itself, such as reapportionment.

The term "legislative representation" is defined in paragraph (i) as "legislative lobbying carried out on behalf of an eligible client." It is used in § 1612.3 (c) and (f) and in § 1612.5(d).

The term "liaison activities" is defined in paragraph (j) and is used in § 1612.1(g). It means activities designed to facilitate administrative, legislative, or grassroots lobbying. The Corporation has deliberately chosen to use the more narrow words "designed to" instead of simply the word "which" in order to establish an intent standard for determining what activities constitute regulated liaison activities. The Corporation will generally characterize activities such as attending legislative sessions or committee hearings, gathering information regarding pending legislation, and analyzing the effect of pending legislation as liaison activities.

The term "political activities" is defined in paragraph (k). The terms "political activities" or "political activity" are used in § 1612.3 (a), (b), (d), (f), and (g); in § 1612.8(b)(4) (in the singular); and in § 1612.9 (a)(2) and (c). The term "political activities" is defined as those activities intended either to influence the making, as distinguished from the administration, of public policy or to influence the electoral process. Political activities include favoring or opposing current or proposed public policy and also include administrative, legislative, and grassroots lobbying.

This definition reflects the generally accepted meaning of the word "political," as anything relating to governmental activities or, more narrowly "relating to . . . the making as distinguished from the administration of governmental policy" (*Webster's Ninth New Collegiate Dictionary* (1985)). It is consistent with the usage of the terms



"political activity" or "political activities" in sections 1006(b)(5), 1006(e)(1), 1007(a)(6), 1007(b)(4), 1007(b)(6) of the Legal Services Corporation Act. The argument has been made that the term as used in the Act at section 1007(a)(6)(A) should be construed narrowly as meaning involvement with elections. Under the common understanding of the term "political," however, legislative and administrative activities are political. Clearly, Congress appreciated the difference between political activity and electoral activity and would have signalled its indication for the Corporation to adopt a narrower interpretation. The legislative history of the Act, moreover, supports a broad construction of the adjective "political." Referring to the Act, the House Committee on Education and Labor declared:

the Committee expects that no grantee—under the guise of fulfilling program training functions—will advocate any *political* action including, but not limited to, boycotts, demonstrations, strikes or picketing.

(H. Rep. 93-247, 93rd Cong., 1st Sess. 11). The 1974 Conference Report on the Act accepted broad House language that required all attorneys while engaging in activities supported in whole or in part by the Corporation to "refrain from any political activity" and rejected a Senate amendment that prohibited only "activity associated with a political party or association, or campaign for public or party office" (H. Rep. 1039, 93rd Cong. 2d Sess. 23 (Conference Report)). In speaking of political activities, Senator Taft referred to abuses "where they [program personnel] would go out and solicit individuals for a political cause" 120 *Cong. Rec.* S. 918 (daily ed. January 31, 1974). It is strained indeed to view the words "political cause" as referring simply to the electoral process. A political cause is commonly a movement that seeks to effect some change in a government or its policies. The election of a President constitutes a political cause; so too does the campaign to change abortion laws or the naturalization and immigration statutes.

Far from being a narrow or tangential prohibition, the restriction on "political activities" lies at the core of the Act and thus, of necessity, at the heart of Part 1612. Congress sought in the Act to differentiate between recognized legal services (which include an attorney's advice and assistance to enable a client to enforce his rights under existing law) and, on the other hand, activities designed to alter government policies. Senator Hathaway was addressing this

fundamental distinction when he declared that "[t]he only advice [a legal services attorney] can give is legal advice. He cannot advise [a client] to join a political party or to do something to enhance political activities" (120 *Cong. Rec.* S. 920 (daily ed. January 31, 1974)).

The term "public policy" is defined in paragraph (l) and is used in § 1612.1 (f) and (k) and in § 1612.9(a)(1). The definition incorporates language from Webster's *Ninth New Collegiate Dictionary* (1985) which defines "policy" as "a high-level overall plan embracing the general goals and acceptable procedures esp[ecially] of a governmental body." The basic substantive application of this definition comes in § 1612.9 on training. The definition of public policy is not intended to prohibit informing eligible clients of their rights under existing laws. Indeed, § 1612.9(b)(3) expressly permits training clients on what the law is. Favoring or opposing current laws, however, is prohibited just as is favoring or opposing proposed laws. Training sessions may not advocate either existing or proposed laws. Thus, for example, programs may train people about the meaning of the Baby Doe cases but training is not to include espousing a position on what the law should be in those cases. At no time, of course, may programs or trainers counsel disregard or nonobservance of the law.

The term "publicity and propaganda" is defined in paragraph (m) and is used in § 1612.1(d); in § 1612.5(c); and in § 162.7(b)(1). The Board does not intend the language "or when taken as whole, an indirect suggestion" to prohibit neutral reporting activities or to forbid stating after-the-fact information on legislative history. It intends, rather, to prohibit favoring or opposing particular policy positions. The Corporation will use an intent or *scienter* standard to differentiate between neutral reporting and prohibited publicity and propaganda. If the intent of putting certain information in a publication is, directly or indirectly, to stir up people for or against legislation, the information is a prohibited communication. The Board found it necessary to use the word "indirectly" in this definition for the same reasons that Congress found it necessary to use the word "indirectly" in section 1007(a)(5) of the Act. It is impossible to address specifically all the ways that clever people might devise to engage in grassroots lobbying. Indirect grassroots lobbying certainly includes such practices as publishing the telephone

number of a legislator along with information about current legislation or printing a letter from a Congressman attacking pending legislation. Public funds should not be used to stimulate public pressure on the legislative process. Accordingly, the Board has added new language to the definition to ensure that the exception for communications to clients does not swallow the general prohibition against publicity and propaganda. The exception for clients will apply only to those clients who are "currently represented by a recipient with regard to a matter directly related to the legislation." At the same time the Board has made clear that attorneys may communicate with other staff in their own programs or with co-counsel.

The term "rulemaking" is defined in paragraph (n) as "an agency process for formulating, amending, or repealing legislation." It is used in § 1612.1 (a), (d), and (f); in § 1612.5(b); and in § 1612.9(a)(2). This definition is basically that of the Administrative Procedure Act (5 U.S.C. 551(5)) which defines rulemaking as "an agency process for formulating, amending or repealing a rule." Since rules are one form of legislation, as defined in § 1612.1(f), the word "legislation" has been substituted for the word "rule" as used in the Administrative Procedure Act.

#### Section 1612.2 Legal assistance activities.

Section 1612.2 sets forth the scope of Part 1612. Unless expressly provided, the regulation applies to all legal assistance activities carried out with funds made available by the Legal Services Corporation or private entities. The purpose of this provision is to ensure that, in most instances, private funds are restricted to the same extent as LSC funds. Section 1612.13 sets forth the express exceptions applying to private funds.

#### Section 1612.3 Legislative activities in general.

Legislative activities are to be exceptional, rather than routine, functions of legal services programs. Section 1612.3(a), accordingly, prohibits the operation of full-time legislative offices with Corporate funds. This paragraph prohibits maintaining a separate office to deal with nothing but legislative and administrative representation.

Section 1612.3(b) restricts the payment of dues with LSC funds to \$100 per recipient per annum to any organization (other than a bar association), a purpose



or function of which is to engage in political or legislative activities. Old § 1612.5(c)(2) restricted dues payments to organizations a "substantial purpose" of which was to influence legislation. Numerous comments criticized this provision as vague. In response, the Board has deleted the words "substantial purpose." Some comments suggested that the Board should allow dues payments to organizations that engage in political or legislative activities as long as the organization segregates LSC funds and ensures they are not used for prohibited activities. The Board, however, is unpersuaded as to the effect and value of a segregation requirement and explicitly declined to include such a provision. If LSC dues are used to help pay a light bill, they free other funds for use in political or legislative activities. Other comments suggested that the Corporation should contact all organizations that might be paid dues with LSC funds and publish every year a list of which are approved and which are not. The Corporation, however, is fully occupied monitoring recipients for which Congress has given it primary responsibility and the administrative burden of further monitoring and review would be too great. Accordingly, the Board decided to create only two exceptions to the general prohibition on dues payments to organizations that engage in political or legislative activities: A *de minimis* exception and a bar association exception. Under the *de minimis* exception, each recipient may choose to pay a total of \$100 per year in dues with LSC funds regardless of the number of organizations, not counting bar associations. Under the bar association exception, the Board intends to permit dues payments to organizations constituting bar associations so long as they are open for membership to all practitioners in the geographical area.

Paragraph (c) clarifies that LSC grant funds may not be used to pay for transporting persons to legislative or administrative proceedings unless they fall into one of three categories: Attorneys or other employees engaged in permitted representational activities, witnesses entering formal appearances on behalf of the recipient's client, and where necessary and appropriate, the client who is being represented at the proceeding.

Paragraph (d) prevents using LSC grant funds to help conduct, or transport people to, events if the primary effect of the expenditure is to facilitate political or legislative activities or any activity that would be prohibited if conducted

with funds made available by the Corporation.

Paragraph (e) prevents expenditure of LSC grant funds for administrative or related costs associated with prohibited activities. This provision is simply an elaboration of the basic rule that only those costs that further the purpose of legal assistance to eligible clients within the provisions of the Act may be charged against the LSC grant. If the primary purpose of the expenditure is furtherance of an objective that is not an authorized use of LSC funds, the expenditure is not an authorized cost of the LSC grant.

Paragraph (f) provides that no funds made available by the Corporation shall be used knowingly to assist others to engage in legislative or political activities. It contains a proviso, however, to the effect that the paragraph shall not be construed to prohibit the administrative or legislative representation permitted by § 1612.5. Comments suggested that former versions of this paragraph had contradicted § 1612.5. By adding the proviso, however, the Board does not intend to remove any of the prohibitions on training. The language of paragraph (f) has been revised to clarify that assisting others to influence legislation is the prohibited activity. By adding the word "knowingly" at the beginning before the word "assist," a *scienter* requirement has been included in Section 1612.3(f).

Section 1612.3(g) prohibits using program funds to attend meetings of coalitions formed to engage in legislative or political activities. The General Accounting Office has strongly criticized the practice of using LSC funds to attend coalition meetings. The Board determined that the only way to stop abuse in this area was by creating an outright prohibition on attending such meetings.

#### Section 1612.4 Legislative and administrative lobbying.

The general rule of section 1007(a)(5) of the Act is that the use of Legal Services funds for legislative and administrative lobbying is prohibited unless it falls within one of several carefully defined exceptions. Since 1977 Congress has repeatedly indicated, through oversight hearings and appropriation riders, that it believes legal services programs have interpreted the Act as authorizing more lobbying activity than was intended. This section sets forth the general prohibition against legislative and administrative lobbying as established in the Act and in Pub. L. 99-180, the appropriation rider.

Paragraph (a), by referring to the definition of legislative lobbying at § 1612.1(h), follows Pub. L. 99-180 in absolutely prohibiting legislative lobbying in three cases: in connection with: (1) Any referendum, initiative, constitutional amendment or similar procedure of a legislative body; (2) authorizations or appropriations for the Corporation or a recipient; or (3) oversight proceedings concerning the Corporation or any recipient. Section 1612.1(h) defines "similar procedure" to mean legislative consideration of matters requiring subsequent ratification by the electorate or matters relating to the structure of government itself. There are no exceptions for communications in this area.

Paragraph (b) prohibits administrative lobbying or other kinds of legislative lobbying unless they fall within one of two categories: certain permissible activities on behalf of eligible clients as provided in § 1612.5 and certain permissible activities undertaken pursuant to the request of public officials as provided in § 1612.6.

#### Section 1612.5 Permissible activities on behalf of eligible clients.

Paragraph (a) provides for administrative representation of an eligible client in an adjudicatory proceeding or in informal negotiations directly involving that client's legal rights or responsibilities with respect to a particular application, claim, or case.

Paragraph (b) provides for representation in rulemaking proceedings under some circumstances. This paragraph requires that the project director consider whether the program should be involved in a particular rulemaking proceeding and that he ensure that recipients do not conduct publicity or propaganda campaigns with respect to rulemaking. If a recipient is representing a *bona fide* client on a particular application, claim, or case, and it becomes necessary in the course of that representation to participate in a rulemaking proceeding, the recipient may take part in such proceeding and do whatever is appropriate for it to do according to the practices of the administrative body, other than engage in grassroots lobbying. If, for example, the administrative body permits cross-examination of witnesses in rulemaking proceedings, then a program attorney may engage in such cross-examination.

Paragraph (c) permits representation in legislative proceedings for the sole purpose of bringing a specific and distinct legal problem to the attention of elected officials. It is not intended to provide blanket permission for full-scale



lobbying in all rulemaking or legislative proceedings. Neither is it intended to afford program attorneys the opportunity to testify about any matters they please. It authorizes only written or oral communications concerning the client's problems and the legal obstacles to the client's obtaining judicial or administrative relief; testimony before the pertinent legislative committee upon the specific legal problem of the client; or the provision of a legal analysis of the client's problems to an official. Like paragraph (b) it does not authorize publicity or propaganda or any efforts to persuade other elected officials or members of the public to support or oppose the proposed legislation.

An employee may make communications under paragraph (c) only if the project director or chief executive of the recipient has determined that the client is in need of relief that can be provided by the official or the body with which the official is associated and that appropriate judicial and administrative avenues to relief have been exhausted. The Board emphasizes that representation under § 1612.5(c) is representation relating to specific problems of specific clients and not to those of a general class of poor people who are not actual eligible clients.

Paragraph (d) prohibits employees from soliciting clients for the purpose of making legislative or administrative representation possible. Section 1007(a)(5)(A) of the Act forbids solicitation that is "in violation of professional responsibilities." Congress adopted this language before the Supreme Court decided *In re Primus*, 436 U.S. 412 (1978). Accordingly, the Board has determined that, to clarify and effect the original intent of Congress, it should place a flat bar upon solicitation in legislative and administrative cases. In making an exception to the general rule against lobbying for activities necessary to the representation of a client, Congress did not intend to authorize recipients to go out and "find" clients.

Paragraph (e) sets out the documentation requirements for communications authorized under paragraph (c). Project directors must document the content of each communication and the basis for the two determinations specified in paragraph (c). They must give written approval setting forth the basis of their determination that the communication is authorized under the policies of the recipient's governing board.

Paragraph (e)(4) requires that the documentation include a retainer in the form specified in § 1611.8, setting forth the specific legal interest of each client

at whose request the communication was undertaken and a statement by the client in the client's own words, insofar as not precluded by the client's inability to communicate, of the problem for which the client sought representation.

The two statements required in paragraph (4) are not redundant since a statement from a lawyer analyzing the legal interests of a client is not the same as a statement showing what brought a client into a legal services office. The purposes of requiring a retainer are to insure that the work done conforms to the desires of the client and to aid the Corporation in auditing grantee compliance with the terms of section 1007(a)(5)(A). The retainer will be more useful for these purposes if, at the commencement of representation, there is a clear record of the client's description of the legal problem for which the attorney finds it necessary to seek relief from a legislature or administrative agency. A statement from the client will help the Corporation to ensure that there is some nexus between the matter that causes the client to seek legal assistance and the program attorney's decision to engage in legislative or administrative representation. A lawyer should not completely take over a case, refashion its objective or transform its intent, and use it to address issues or problems which are incidental or foreign to the client, or which the client did not raise. The legal relief sought should be in direct and proximate response to the client's request. The requirement of a retainer does not suggest a more sophisticated knowledge of the law than could reasonably be expected of eligible clients who, after all, may be presumed able to express in their own words "the matter on which relief is sought." The Board recognizes that there are a number of clients, such as those who have grown up totally dependent upon American sign language, who would have trouble giving statements that most laymen and lawyers would find comprehensible. In response to these concerns, the Board has created an exception for clients who are unable to communicate. In such cases the program should itself supply a statement summarizing the problems that brought the client to seek representation.

Paragraph (e)(5) requires that the documentation also include the director's certification that the communication is not the result of participation in a coordinated effort to communicate with elected officials. Prior versions of this paragraph required that the director certify that the communication was prepared by the attorney and client without consulting

with persons "who are participating in a coordinated effort to influence legislation." In response to comments the Board deleted this requirement.

Paragraph (f) requires that the recipient's governing body adopt policies to guide the director in approving communications that bring legal problems to the attention of officials. The regulation directs that such policies shall require periodic reports to the governing body, shall ensure that staff neither solicits requests to undertake communications with elected officials nor participates in a coordinated effort to provide communications on a particular subject, and takes into account the recipient's priorities in resource allocation. The reports must be consistent with restrictions on disclosure of confidential information imposed by applicable law.

Paragraph (g) permits requests to introduce private relief bills.

Paragraph (h) recognizes that program employees may communicate with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies. Program employees may inform a current client about a new or proposed statute, executive order, or administrative regulation consistent with the provisions of § 1612.7. They may advise a client with respect to the client's own communications to officials. All such communications, however, are subject to the provisions of § 1612.5(c). Program employees may communicate directly or indirectly with the Corporation for any purpose.

#### *Section 1612.6 Permissible activities undertaken pursuant to request of public officials.*

Paragraph 1612.6(a) sets forth the conditions under which legal services personnel may respond to request from public officials. In drafting this provision the Board kept one basic principle in mind: the primary purpose of LSC grants is to help respond to client requests for representation. Some comments had requested that the Board allow recipients to disseminate information to anyone an official or his agent might direct as long as there was not "widespread" dissemination of such communications. In considering paragraph (a), the Board explicitly declined to add this expansive language. Not only should the Corporation not be in the position of having to decide what kind of communication is too widespread, but also programs should not accept delegation of the functions and responsibilities of governmental



offices and staff in circulating communications. The Board is persuaded that when Congress provided that legal services personnel could respond to requests from public officials, Congress meant requests for information, not requests to perform office tasks. Public officials themselves can reproduce information and disseminate it instead of requesting legal services personnel to do so. The authority to respond to official requests is limited to requests concerning "a specific matter." Program employees may not communicate with persons other than the requesting party, or agents or employees of such party. Moreover, of course, responses to requests should be made only to an extent compatible with the program's priorities and with the demands of clients on the program's time.

Section 1612.6(b) prohibits soliciting requests from public officials or governmental agencies. This provision does not prohibit sending out otherwise permissible publications such as programs' annual reports.

Formerly § 1612.6(b)(1) required that requests from legislators or agency officials had to be in writing and that legal services attorneys, before responding to a specific request, had to obtain the explicit written approval of their project directors. In response to various comments, the Corporation has removed this requirement. Paragraph (c) now requires simply that the recipient adopt procedures and forms to document its compliance with this section. The documentation must include contemporaneous documentation that states the type of representation or assistance requested by the official and that identifies the regulation, legislation, or executive order to be addressed.

#### Section 1612.7 Grassroots lobbying.

In its original form this section of the regulation was added in March of 1983 in response to an earlier recommendation from the Comptroller General. As the Comptroller General stated clearly in his May 1, 1981, opinion, section 1007(a)(5) of the Legal Services Corporation Act does not authorize a recipient's employees to engage in indirect or grassroots lobbying activity such as organizing coalitions or engendering communications from the public favoring or opposing changes in public policy. These activities are not necessary to the provision of legal advice or of representation in respect of a client's legal rights and responsibilities.

Accordingly, paragraph (a) forbids using Corporation funds or funds from

private entities for grassroots lobbying. The word "entities," as used here and throughout Part 1612, is broadly inclusive and extends to natural persons and to all other bodies, such as corporations, whether or not they possess legally recognized status. For further analysis of what constitutes grassroots lobbying, please see the discussion of the definition of grassroots lobbying, *supra*, at § 1612.1(d) and the definition of publicity and propaganda, *supra*, at § 1612.1(m).

Paragraph (b) prohibits the distribution of publications that contains any reference to proposed or pending legislation unless the publication meets five criteria. First, the publication must not contain any publicity or propaganda. Second, it must not contain directions on how to lobby generally or in respect of particular legislation. Third, prior to its dissemination, the publication must have been reviewed by the recipient's project director, or by his or her designee, for conformity to LSC regulations. Fourth, a copy of the publication must have been provided to the Corporation within 30 days after publication. Fifth, LSC funds must have been used only for costs incident to the publication's preparation, production, or dissemination. It must have been disseminated only to recipients, recipient staff and board members, private attorneys representing eligible clients, eligible clients currently represented by a recipient with regard to a matter directly related to the legislation, and the Corporation, as opposed to the public at large, or to eligible clients generally. The Corporation wishes to emphasize in this connection that limited Corporate resources are to be used for representing eligible clients on specific matters and not for distributing publications to every prospective or potential client within a service area. Consequently, this provision does not permit mailing publications to eligible clients generally or other forms of mass communication. It does not, however, prevent sending letters to specific eligible clients.

#### Section 1612.8 Public demonstrations and activities.

This section prohibits anyone that is engaging in legal assistance activities and that is using resources provided by the Corporation, by private entities, or by a recipient, directly or through a subrecipient, from participating in, or encouraging public demonstrations and illegal activities. Paragraph (a) prohibits participation in, or encouragement of, demonstrations, picketing, boycotts, and strikes. The only exception to the prohibition of paragraph (a) is that a

program employee may participate in these activities in connection with his own employment.

Paragraph (b) prohibits people, while carrying out legal assistance activities and while using resources provided by the Corporation, by private entities, or by a recipient, directly or through a subrecipient, from engaging in, or encouraging others to engage in illegal activities. Illegal activities include, but are not limited to, rioting and civil disturbances, activities in violation of court injunctions, and intentional identification of the Corporation with any political activity. There are no exceptions to the prohibition of paragraph (b).

Paragraph (c) makes clear that the prohibition on participation in demonstrations, strikes, and other such activities does not prohibit an attorney from fulfilling his professional responsibilities to a client.

#### Section 1612.9 Training.

This section implements section 1007(b)(5) of the Act and the related prohibitory provision of Pub. L. 99-180. It is important to note at the outset that this section does not purport to control relations between attorneys and clients. It places no restrictions on the advice attorneys can give their clients. It does control and restrict the nature of the training that can be conducted with LSC funds.

Paragraph (a) prohibits funding of training programs that advocate particular public policies; that encourage certain types of enumerated activities, including political activities or labor activities; or that disseminate information about these policies or activities.

Paragraph (a)(2) includes a provision that prohibits training people to develop strategies to influence legislation or rulemaking. Program involvement with legislative activities and rulemaking should be peripheral, and recipients should not need to conduct training programs in these areas.

Paragraph (a)(3) prohibits the dissemination of information about public policies or certain enumerated activities. This prohibition, as shown by paragraph (b)(3), which expressly permits informing eligible clients about their rights under existing law or about the meaning or significance of particular bills, is not intended to keep recipients from informing people about their rights under current law.

Paragraph (b) excepts from the general prohibition on training any training that is necessary for preparing attorneys or paralegals to provide



adequate legal assistance to eligible clients, to advise eligible clients as to the nature of the legislative process in general, to inform them of their rights under a statute or regulation already enacted or about the meaning or significance or particular bills, or to understand what activities are permitted under relevant laws and regulations. Programs, however, may engage in permitted training activities only to the extent compatible with meeting the demand for client service and the priorities established pursuant to Part 1620 or, in the case of support centers, to the extent compatible with the provision of support services to recipients. Recipients may conduct training that includes information about the meaning or significance of particular bills and training on what activities are permitted or prohibited under relevant laws and regulations.

Paragraph (b)(2) contains a distinction which prohibits training on lobbying strategies for particular bills. Such training does not constitute "advice as to the nature of the legislative process in general."

The Board found it significant that the GAO specifically focused on past abuse of training programs for lobbying purposes. Accordingly, paragraph (c) provides that a recipient cannot use funds for training in respect of political or legislative activities or with regard to areas in which program involvement is prohibited. Thus, although participation in legislative and political activities is not completely prohibited, training in these areas is. The Board explicitly declined to create an exception that would have allowed training in rulemaking and legislative lobbying. For years the Board has been assured by recipients that lobbying and legislative activity amount to a very small portion of program activity. In light of these representations, it makes little sense to devote money to training in lobbying techniques even though the regulations permit some lobbying. Lobbying activities should be so peripheral to what recipients are doing that training programs on lobbying techniques should not be necessary. In response to comments, the prohibition on training in substantive areas where only limited or incidental activities are allowed has been removed. Programs may offer training in areas where the law and regulations permit activity. They may also train managers and other staff on what activities are permitted or prohibited under the Act and regulations. Such training of recipients is not a political or legislative activity unless, for example, the program

conducts it for the purpose of advocating some position with respect to these regulations, such as changing them or retaining them as they are. Learning about the law is entirely different from undertaking to influence officials or instructing people how to influence public officials.

Paragraph (c) specifically provides that funds may be used for training with regard to adjudicatory proceedings. The Board created this exception because adjudicatory proceedings, unlike rulemaking proceedings and legislative lobbying, are a form of judicial proceedings in which a client asserts a right under existing law.

#### Section 1612.10 Organizing.

Section 1612.10 implements provisions of section 1007(b)(7) of the Act which contains an exception to enumerated prohibited activities. Thus, for instance, if a client should so request, a recipient may draft the articles of incorporation for an organization. At the same time, however, section 1007(b)(7) prohibits recipients from initiating the formation, or acting as an organizer of, any association, federation, labor union, coalition, network, alliance, or similar entity. Put simply, legal services attorneys are not to initiate or originate the formation of organizations and then propel them into being as organizers, promoters, or facilitators.

In accordance with the Act § 1612.10 makes clear that recipients may provide advice or assistance to eligible clients concerning the laws applicable to formation or operation of an organization. According to the legislative history of the Act, it is permissible "to encourage poor people aggrieved by particular problems to consider organizing to foster joint solutions to common problems." In observance of this Congressional concern, the last sentence of § 1612.10(a) specifically provides that the restriction on "communication" does not include advice given an individual client during the course of legal consultation. Indeed, nothing in paragraph (a) purports to restrict recipients from advising clients of the advantages of belonging to an organization. The old section on organizing (§ 1612.30) provided that legal advice or assistance could not be given in the formation of an organization, a substantial purpose of which was to influence legislation, elections, or ballot propositions. In response to comments criticizing the vagueness of the term "substantial purpose", this sentence has been deleted. Paragraph (b) provides that legal services programs may, at the request of an eligible client, give legal advice on matters of incorporation,

bylaws, tax problems and other matters essential to the planning of an organization, regardless of its purpose. The restriction is simply that the service provided must be legal in nature and must be provided in response to a *bona fide* client inquiry rather than at the initiative of the recipient's employees. Programs may engage in permitted legal assistance to organizers, however, only to the extent compatible with meeting the demands for client services and the priorities established pursuant to Part 1612 or, in the case of support centers, to the extent compatible with the provision of support services to recipients.

Although § 1612.10 does not restrict the sort of legal advice that recipients can give eligible clients, it prohibits recipients from using funds to advocate that anyone other than a client start or join an organization. Such communications do not constitute the legal assistance activities that are the real concern of recipients. Paragraph (a) forbids recipients to develop networks of advocates. Significantly, section 1007(b)(7) of the Act places no limit on the types of organizations that are subject to this prohibition on organizing. The Act makes clear that an organization need not be a legal person to fall within the restrictions. In setting forth its prohibition on organizing, the Act uses as examples the words "federation" and "association." Neither necessarily connotes organizations that are "legal persons" or which have some recognized legal status. Many associations, for instance, do not have bylaws, charters, or even legal standing. The words "similar entity," moreover, are plainly a catchall provision meant to include groups such as task forces or networks. Congress clearly intended to prohibit recipients from initiating the formation of any group of people. Accordingly, under paragraph (a), no matter what language it may employ in describing an organization, whether "coalition," "network," or some other term, a recipient may not, under this part, initiate or promote the meeting of a group of people, regardless of its purpose. At the same time, the Board recognizes that such networks may be useful. Therefore, if reasonable, recipients may work with such organizations and advise their clients to work with such organizations.

The second sentence of § 1612.10(a) would likewise prohibit programs from advocating that their employees join an organization. Programs may not make employment conditional upon membership in an organization, whether it be the American Bar Association or the American Library Association.



Under paragraph (a), however, programs may tell their employees that organizations exist; it is advocacy that is prohibited.

Paragraph (a) also prohibits such practices as allowing other organizations to leave promotional literature on the recipients' premises for inspection by clients. The Board has no problem with a recipient's furnishing a client with a package of information from groups such as local tenants' organizations as long as the information is clearly related to the problem for which the client came to the recipient. Leaving information lying around a legal services office, however, for inspection by anyone who might walk in, whether or not a client, amounts to encouraging the process or organizing generally, without regard to its relevance to a particular legal problem. This provision would not, however, prohibit programs from sending out notices to other programs advising them to join groups to learn about the use of computers or about other clerical or office skills.

#### *Section 1612.11 Accounting and timekeeping*

Section 1612.11 deals with accounting and timekeeping. The Board is concerned that no one knows how much lobbying and legislative and administrative representation occurs. It has decided, therefore, to require recipients to maintain records of the time and the direct and indirect expenses associated with all legislative activities as defined in § 1612.1(j), regardless of the sources of the funds supporting such activities. Because of the definition of legislative activities, this will require recipients to account for time and resources spent on all legislative and administrative lobbying and all legislative and administrative representation. As representatives of field programs repeatedly conceded to the Board, lobbying does not occur solely in legislatures—administrative rulemaking proceedings account for some of the most important lobbying that takes place. It makes little practical difference in which forum a recipient is lobbying. Recipients must keep records of time spent formulating positions and strategy as well as time spent in direct communication with officials. They must also specify the sources of funds supporting regulated activities.

In addition to keeping general records relating to regulated activities, recipients must account for all the working hours of those employee who are registered lobbyists or who engage in legislative activities. These time logs are necessary to ensure the completeness of the records furnished

pursuant to the terms of Pub. L. 99-180 and to enable the Corporation to enforce section 1010(c) of the Act which prohibits the use of private non-Corporation funds for prohibited purposes. The Board was concerned that if it did not require recipients to document all of their lobbyists' time, it would learn very little about the amount of time spent upon such things as liaison activities. No matter what the time of day, if an employee engages in legislative activities on behalf of a client, the employee must, pursuant to this section, account for such time. Thus, an employee must record all time in cases where he lobbies at the legislature on behalf of a client from 9:00 in the morning until 4:00 in the afternoon, even though the employee then returns to the recipient's offices and continues working late into the night because the legislature is in session.

Anybody who engages in legislative or administrative rulemaking must furnish the Corporation with a time log of all working hours. However, if all an employee engages in are administrative adjudicatory proceedings the employee will not have to furnish a complete time log: participation in adjudicatory proceedings does not trigger the timekeeping requirement for employees.

Paragraph (b) requires recipients to submit quarterly reports describing their legislative activities. In furnishing these reports recipients must comply with restrictions on disclosure of confidential or privileged information imposed by the applicable law of any state or other jurisdiction.

Both paragraphs of § 1612.11 provide that the Corporation may, at its option, specify the manner in which records of legislative activities are to be maintained. After ascertaining that the Corporation has never specified a manner in which recipients are to keep records on lobbying, the Board deleted prior language that required records to be kept in the manner specified by the Corporation. Until the Corporation specifies how records of legislative activities are to be maintained, recipients may keep records of regulated activities in the best way that they can. They need not, however, keep duplicate records of activities. Once the Corporation amends the Case Service Reports (CSR's) to include legislative activity, recipients will have to report these activities in the form required by the CSR's. The Board intends, however, to conform the CSR's to the lobbying regulation and to insure that all of the information required by § 1612.11 will also be required by the CSR's.

#### *Section 1612.12 Enforcement*

Section 1612.12 details a number of the enforcement options available to the Corporation in cases where Part 1612 has been violated. Paragraph (a) provides that the Corporation may suspend or terminate the employment of any employee of the Corporation who violates Part 1612. The Corporation may also impose appropriate sanctions against recipients which fail to ensure that their employees refrain from violating Part 1612.

Paragraph (b) explicitly sets forth a number of the enforcement options available against recipients which fail to ensure that their employees refrain from violating either Part 1612 or the provisions of the Act relating to lobbying, including those relating to the use of private funds. In accordance with Parts 1606, 1618, 1623 and 1625, the Corporation may suspend or terminate financial assistance or deny refunding to such recipients. It may also recover costs incurred by recipients as a result of activities proscribed by Part 1612.

Paragraph (c) describes some of the steps that recipients are to take in order to publicize and enforce Part 1612. First, they are to advise their employees about their responsibilities under Part 1612. Second, recipients must establish procedures for determining whether employees have violated Part 1612 and must also establish policies for determining the appropriate sanctions to be imposed for violations. Each recipient must then transmit a copy of its policy to the Corporation. Each policy is to include use of administrative reprimand (in cases of minor or unintentional violations, or where there are mitigating circumstances); suspension and termination of employment; and other sanctions appropriate to the enforcement of Part 1612.

Third, recipients must inform the Office of Monitoring, Audit, and Compliance within 30 days of imposing sanctions for violating Part 1612. Prior to 1984 Part 1612 required recipients to consult with the General Counsel of the Corporation before they determined what sanctions to impose. The present provision, however, recognizes that the Corporation is not directly involved in personnel decisions of programs, but is only concerned with assuring that programs comply with the Act and regulations.

Fourth, whether or not sanctions are imposed, recipients are to make available to the Corporation the records of their investigation of alleged violations. Recipients should submit these records on a quarterly basis to the



Office of Monitoring, Audit, and Compliance. Because the Board believes it to be important to recognize ethical restrictions explicitly, the Board has provided that recipients comply with the requirement of § 1612(c)(4) in a manner that is consistent with restrictions on disclosure of confidential or privileged information imposed by the applicable law of any state or other jurisdiction.

#### Section 1612.13 Private funds.

Section 1612.13 provides that recipients may use private funds to lobby, if a government agency, elected official, legislative body, committee, or committee member is considering a measure directly affecting the activities of the recipient or the Corporation under the Act. After deliberating, the Board decided to permit private funds to be used in such cases because, for the past year, it has been urging recipients to explore other funding sources. Clearly, if recipients are to go to state legislatures and local bodies to obtain funds replacing those that Congress can no longer make available, they must have the right to lobby legislatures and local bodies.

The Board was not persuaded of the wisdom or the practical necessity for other exceptions to the prohibition on using private funds for lobbying. Accordingly, it has determined that in all other cases private funds and LSC funds should be subject to the same restrictions. The Board believes, for at least two reasons, that it has the power to make this decision. First, when Congress adopted section 1010(c) of the Act, it provided in effect that private funds and federal funds were to be treated identically: If a recipient could not engage in an activity using federal funds, it should not be able to do so using private funds. Since amendment of the Legal Services Corporation Act in 1977, however, a complication has arisen. For various reasons and because no clear consensus exists to modify the substantive legislation granting authority to the Corporation, Congress has not subsequently revised the Legal Services Corporation Act. Instead, it has amended the substantive legislation in an oblique way by placing restrictions on the use of annual appropriations. Since funding riders restrict only federal funding and not private funding, Congressional language has never directly enjoined recipients from using private funds for purposes prohibited in the appropriation riders. Nonetheless, no Congressional statement or legislative enactment has, over the past nine years, indicated that Congress ever intended to depart or retreat from its plainly expressed determination that

federal funds and private funds ought to be treated alike. Accordingly, the Board has concluded that to effectuate the intent of Congress restrictions contained in the riders should extend to private funds.

The second reason for inclusive treatment is that the Corporation has broad inherent authority to regulate the manner in which its recipients use private funds. Section 1010(c) of the Act contains no prohibition against the Corporation's imposing restrictions by regulation on private funds. The Act plainly contemplates, moreover, that private funds "shall not be expended by recipients for any purpose prohibited by [its terms]" 42 U.S.C. 2996i(c) (emphasis supplied). Congress, furthermore, has pointedly made the Legal Services Corporation a District of Columbia corporation, and a District of Columbia corporation plainly has the power to contract and thereby to impose restrictions on parties with which it transacts business. No First Amendment consideration, as has been suggested, prevents the Corporation from imposing contractual obligations on its recipients.

#### List of Subjects in 45 CFR Part 1612.

Administrative representation, Legal services, Lobbying, Publicity, Reporting and recordkeeping requirements.

For the reasons set out above, Part 1612 is revised as follows:

#### PART 1612—RESTRICTIONS ON LOBBYING AND CERTAIN OTHER ACTIVITIES

- Sec.
- 1612.1 Definitions.
  - 1612.2 Legal assistance activities.
  - 1612.3 Legislative activity in general.
  - 1612.4 Legislative and administrative lobbying.
  - 1612.5 Permissible activities on behalf of eligible clients.
  - 1612.6 Permissible activities undertaken pursuant to request of public officials.
  - 1612.7 Grassroots lobbying.
  - 1612.8 Public demonstrations and activities.
  - 1612.9 Training.
  - 1612.10 Organizing.
  - 1612.11 Accounting and timekeeping.
  - 1612.12 Enforcement.
  - 1612.13 Private funds.

Authority: Secs. 1006(b)(5), 1007(a)(5), (6) and (7), 1011, 1008(e), Legal Services Corporation Act of 1974, as amended (42 U.S.C. 2996e(b)(5), 2996f(a)(5), (6) and (7), 2996g, 2996g (e)); Pub. L. 95-431, 92 Stat. 1021; Pub. L. 96-68, 93 Stat. 416; Pub. L. 96-536, 94 Stat. 3166; Pub. L. 97-161, 96 Stat. 22; Pub. L. 97-377, 96 Stat. 1874; Pub. L. 98-166, 97 Stat. 1071; Pub. L. 99-180, 99 Stat. 1185.

##### § 1612.1 Definitions.

(a) "Adjudicatory proceeding," as used in this part, means a proceeding by a Federal, State, or local agency,

commission, authority, or government corporation which makes a determination that is of particular rather than general applicability, that affects private rights or interests, and that results in a final disposition, whether affirmative, negative injunctive, or declaratory in form. The term does not include rulemaking but does include licensing.

(b) "Administrative lobbying," as used in this part, means any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or other device, intended or designed to influence any decision by a Federal, State or local official, agency, commission, authority or government corporation.

(c) "Administrative representation," as used in this part, means administrative lobbying carried out on behalf of an eligible client.

(d) "Grassroots lobbying," as used in this part, means publicity or propaganda intended or designed to support or defeat legislation pending before Congress or before State, county, or municipal legislative bodies, including any commission, authority, or government corporation with rulemaking authority, or intended or designed to influence any decision by a Federal, State, county, or municipal administrative body or intended or designed to influence any decision by the electorate on a measure submitted to it for a vote.

(e) "Legal assistance activities," as used in this part, means any activity—

- (1) Carried out during working hours or while on official travel;
- (2) Using resources provided by the Corporation or a recipient, directly or through a subrecipient; or
- (3) That, in fact, provides legal advice or representation to an eligible client.

(f) "Legislation", as used in this part, means any action or proposal for action by Congress, by a State legislature, or by any other body of governmental, municipal, or local officials, whether elected or appointed, (including any commission, authority, or government corporation with rulemaking authority) formulating a rule for the future or formulating a statement of general or particular applicability and future effect which is designed to implement, interpret, or prescribe law or public policy. The term includes, but is not limited to, action on bills, constitutional amendments, rules, regulations, the ratification of treaties and intergovernmental agreements, approval of appointments and budgets, adoption of resolutions not having the force of law, and approval or disapproval of



actions of the executive. It does not include those actions of a legislative body which adjudicate the rights of individuals under existing laws (such as action taken by a local council sitting as a Board of Zoning Appeals).

"Legislature" as used herein does not include any Indian Tribal Council.

(g) "Legislative activities," as used in this part, means administrative, legislative, and grassroots lobbying and liaison activities.

(h) "Legislative lobbying," as used in this part, means any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or any other device directly or indirectly intended to influence any Member of Congress or any other Federal, State or local elected nonjudicial official—

(1) In connection with any Act, bill, resolution or similar legislation;

(2) In connection with any referendum, initiative, constitutional amendment, or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body acting in a legislative capacity. The term "similar procedure" as used in this part refers to legislative consideration of matters which by law must be determined by a vote of the electorate or matters relating to the structure of government itself, such as reapportionment;

(3) In connection with inclusion of any provision in a legislative measure appropriating funds to, or defining or limiting the functions or authority of, the recipient or the Corporation; or

(4) In connection with the conduct of oversight proceedings concerning the recipient or the Corporation.

(i) "Legislative representation," as used in this part, means legislative lobbying carried out on behalf of an eligible client.

(j) "Liaison activities," as used in this part, means activities designed to facilitate administrative, legislative, or grassroots lobbying, and includes, but is not limited to, such activities as attending legislative sessions or committee hearings, gathering information regarding pending legislation, and analyzing the effect of pending legislation.

(k) "Political activities," as used in this part, means those activities intended either to influence the making, as distinguished from the administration, of public policy or to influence the electoral process. Political activities include favoring or opposing current or proposed public policy and also include administrative, legislative, and grassroots lobbying.

(l) "Public policy", as used in this part, means an overall plan embracing the general goals and acceptable procedures of any governmental body. Public policy includes but is not limited to, statutes, rules, and regulations already enacted by a governmental body.

(m) "Publicity or propaganda", as used in this part, means any oral, written, or electronically transmitted communication or any advertisement, telegram, letter, article, newsletter, or other printed or written matter or device which contains a direct suggestion, or, when taken as a whole, an indirect suggestion to the public at large or to persons outside of the recipient program (other than a client or group of clients currently represented by a recipient with regard to a matter directly related to legislation, or their counsel or co-counsel) to contact public officials in support of or in opposition to legislation, or to contribute to or participate in any demonstration, march, rally, fundraising drive, lobbying campaign, or letter writing or telephone campaign for the purpose of influencing the course of such legislation.

(n) "Rulemaking", as used in this part, means an agency process for formulating, amending, or repealing legislation.

#### § 1612.2 Legal assistance activities.

Except as hereinafter provided, the provisions of this part shall apply to all legal assistance activities carried out with funds made available by the Legal Services Corporation or private entities.

#### § 1612.3 Legislative activity in general.

No funds made available by the Corporation shall be used to—

(a) Maintain separate offices for the sole purpose of engaging in political or legislative activities;

(b) Pay dues exceeding \$100 per recipient per annum to any organization (other than a bar association), a purpose or function of which is to engage in political or legislative activities;

(c) Pay for transportation to legislative or administrative proceedings of persons other than employees engaged in activities permitted under this section or witnesses entering appearances in such proceedings on behalf of clients of the recipient, except that such funds may be used to transport the client where necessary and appropriate; this paragraph does not authorize payment of transportation expenses for employees not actually engaged in permitted legislative or administrative representation;

(d) Pay, in whole or in part, for the conduct of, or transportation to, an event if a primary purpose of the

expenditure is to facilitate political or legislative activities or any activity which would be prohibited if conducted with funds made available by the Corporation;

(e) Pay for administrative or related costs associated with any activity prohibited by this part;

(f) Knowingly assist others to engage in legislative or political activities; provided, however, that this paragraph shall not be construed to prohibit the administrative or legislative representation permitted by § 1612.5; or

(g) Attend meetings of coalitions formed to engage in legislative or political activities.

#### § 1612.4 Legislative and administrative lobbying.

(a) None of the funds made available by the Legal Services Corporation may be used to pay for legislative lobbying as defined in § 1612.1(h)(2), (3), and (4).

(b) None of the funds made available by the Legal Services Corporation may be used to pay for legislative lobbying as defined in § 1612.1(h)(1) or for administrative lobbying as defined in § 1612.1(b), except as provided in § 1612.5 and 1612.6.

#### § 1612.5 Permissible activities on behalf of eligible clients.

(a) An employee of a recipient may provide administrative representation for an eligible client in an adjudicatory proceeding or in informal negotiations directly involving that client's legal rights or responsibilities with respect to a particular application, claim or case.

(b) Notwithstanding anything in this part to the contrary, an employee of a recipient may provide legal assistance to a current eligible client in a rulemaking proceeding, consistent with the practices of the particular administrative official or body, on a particular application, claim or case directly involving the client's legal rights or responsibilities. Such assistance may be provided only if the program director or chief executive of such recipient has determined prior to such representation that the client or each such client is in need of relief that can be provided by such administrative official or body.

(c) An employee of a recipient may, upon the request of a current client or clients, communicate directly with Federal, State or local elected officials for the sole purpose of bringing specific and distinct legal problems to the attention of such officials. This provision authorizes written or oral communications notifying public officials or legislative committees of the client's problems and of the legal



obstacles to the client's obtaining judicial or administrative relief; testimony before pertinent legislative committees upon the specific legal problems of the client; or the provision of a legal analysis of the client's problems to officials. It does not authorize publicity or propaganda or any efforts to persuade members of the public to support or oppose the proposed legislation. Such communications may be made only if the project director or chief executive of such recipient has determined, prior to such communications—

(1) That the client or each such client is in need of relief that can be provided by the official or the legislative body with which the official is associated; and

(2) That appropriate judicial and administrative relief has been exhausted.

(d) No employee shall solicit a client for the purpose of making legislative or administrative representation possible.

(e) In connection with each communication authorized by paragraph (c) of this section, the project director shall maintain the following documentation:

(1) The content of each such communication;

(2) The basis for the two determinations specified in paragraph (b) of this section;

(3) The director's written approval of such communication, setting forth the basis of his determination that such communication is authorized under the policies of the recipient's governing board adopted pursuant to paragraph (e) of this section;

(4) A retainer in the form specified in § 1611.8, setting forth the specific legal interest of each client at whose request the communication was undertaken and a statement by the client, insofar as not precluded by the client's inability to communicate, in the client's own words of the problem for which the client sought representation;

(5) The director's determination that such communication is not the result of participation in a coordinated effort to communicate with elected officials on the subject matter.

(f) The governing body of a recipient shall adopt a policy to guide the director of the recipient in determining when to approve a communications to a Federal, State or local official under paragraph (e) of this section. The policy adopted shall—

(1) Consistent with restrictions on disclosure of confidential information imposed by applicable law, require periodic reports to the governing body on the communications approved, which

report shall include a statement on the exhaustion of appropriate judicial and administrative relief;

(2) Ensure that staff does not solicit requests to undertake communications with elected officials nor participate in a coordinated effort to provide communications on a particular subject; and

(3) Require that, in determining the amount of effort to be expended in preparing the communication, the director take into account the recipient's priorities in resource allocation.

(g) Notwithstanding the prohibition in paragraph (c) of this section of communications to elected officials that do more than bring a problem to the official's attention, a project director may approve communications to elected officials requesting introduction of specific "private relief bills," which for purposes of this part mean bills allowing a specifically named persons or groups to make claims against a government for which there is no other remedy. The documentation required under paragraph (e) of this section shall be maintained in connection with such communications.

(h) Nothing in this or any other section is intended to prohibit an employee from—

(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies;

(2) Informing a current client about a new or proposed statute, executive order, or administrative regulation consistent with the provisions of § 1612.7; or

(3) Communicating directly or indirectly with the Corporation for any purpose.

#### **§ 1612.6 Permissible activities undertaken pursuant to request of public officials.**

(a) To the extent compatible with meeting the demands for client service and priorities set by the recipient pursuant to Part 1620 of these regulations or to the extent compatible with the provision of support services to recipients relating to the delivery of legal assistance, an employee may respond to a request from a governmental agency, elected official, legislative body, committee, or member made to the employee or to a recipient to testify, draft or review legislation or to make representations to such agency, official, body, committee or members on a specific matter. This exception for responses to officials does not authorize communication with anyone other than the requesting party or an agent or employee of such party.

(b) No employee of the recipient shall, directly or indirectly, solicit or arrange a request from any official to testify or otherwise make representations in connection with legislation.

(c) Recipients shall adopt procedures and forms to document compliance with this section. Such documentation shall include contemporaneous documentation by the recipient which states the type of representation or assistance requested by the public official and identifies the regulation, legislation, or executive or administrative order to be addressed.

#### **§ 1612.7 Grassroots lobbying.**

(a) No funds made available by the Corporation or by private entities shall be used for grassroots lobbying.

(b) No funds made available by the Corporation or by private entities shall be used to support the preparation, production, or dissemination of any article, newsletter, or other publication or written matter or other form of mass communication which contains any reference to proposed or pending legislation unless—

(1) The publication does not contain any publicity or propaganda;

(2) The publication does not contain directions on how to lobby generally or on particular legislation;

(3) The recipient's project director, or his or her designee, has reviewed each publication produced by the recipient prior to its dissemination for conformity to these regulations;

(4) The recipient provides a copy of any such material produced by the recipient to the Corporation within 30 days after publication; and

(5) Such funds are used only for costs incident to the preparation, production, or dissemination of such publications to the Corporation, recipients, recipient staff and board members, private attorneys representing eligible clients, and eligible clients currently represented by a recipient with regard to a matter directly related to the legislation, as opposed to the public at large, or eligible clients generally.

#### **§ 1612.8 Public demonstrations and activities.**

(a) While carrying out legal assistance activities and while using resources provided by the Corporation, by private entities, or by a recipient, directly or through a subrecipient, no person shall—

(1) Participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee's own employment situation; or



(2) Encourage, direct, or coerce others to engage in such activities, or otherwise usurp or invade the rightful authority of a client to determine what course of action to follow.

(b) While carrying out legal assistance activities and while using resources provided by the Corporation, by private entities, or by a recipient, directly or through a subrecipient, no person shall at any time engage in or encourage others to engage in—

(1) Any rioting or civil disturbance;

(2) Any activity in violation of an outstanding injunction of any court of competent jurisdiction;

(3) Any other illegal activity;

(4) Any intentional identification of the Corporation or any recipient with any political activity.

(c) Nothing in this section shall prohibit an attorney from—

(1) Informing and advising a client about legal alternatives to litigation or the lawful conduct thereof; or

(2) Taking such action on behalf of his client as may be required by his professional responsibilities or applicable law of any State or other jurisdiction.

#### § 1612.9 Training.

(a) No funds made available by the Corporation or by private entities may be used for the purpose of supporting or conducting training programs that—

(1) Advocate particular public policies; or

(2) Encourage or facilitate political activities, labor or antilabor activities, boycotts, picketing, strikes or demonstrations, or the development of strategies to influence legislation or rulemaking; or

(3) Disseminate information about such policies or activities.

(b) To the extent compatible with meeting the demands for client service and priorities set by the recipient pursuant to Part 1620 of these regulations or to the extent compatible with the provision of support services to recipients relating to the delivery of legal assistance, nothing in this section shall be construed to prohibit any training of attorneys or paralegal personnel necessary for preparing them—

(1) To provide adequate legal assistance to eligible clients;

(2) To advise any eligible client as to the nature of the legislative process in general as opposed to discussing a lobbying strategy for a particular bill;

(3) To inform any eligible client of his rights under any statute, order or regulation already enacted, or about the meaning or significance of particular bills; or

(4) To understand what activities are permitted or prohibited under relevant laws and regulations.

(c) No funds made available by the Corporation or by private entities may be used to pay for participation by any person or organization in training with regard to political or legislative activities, except for adjudicatory proceedings, or with regard to areas in which program involvement is prohibited pursuant to the provisions of the Act, of other applicable Federal law, or of Corporation regulations, guidelines, or instructions.

#### § 1612.10 Organizing.

(a) No funds made available by the Corporation or by private entities may be used to initiate the formation, or to act as an organizer of any association, federation, labor union, coalition, network alliance, or any similar entity. No funds may be employed for any communication or any meeting to advocate that anyone organize or join any organization. The term "communication" does not include advice given an individual client during the course of legal consultation.

(b) To the extent compatible with meeting the demands for client service and priorities set by the recipient pursuant to Part 1620 of these regulations, or to the extent compatible with the provision of support services to recipients relating to the delivery of legal assistance, this section shall not be interpreted to prevent recipients and their employees from providing legal advice or assistance to eligible clients who desire to plan, establish, or operate organizations, such as by preparing articles of incorporation and bylaws.

#### § 1612.11 Accounting and timekeeping.

(a) Recipients shall maintain separate records of the activities regulated in this part. These records shall document the direct and indirect expenses, time spent on, and the sources of the funds supporting, all legislative activities, regardless of the sources of the funds employed. In addition, recipients shall require all employees who are registered lobbyists or who devote any of their time to legislative activities, except for adjudicatory proceedings, to maintain a time log accounting for all working hours. The Corporation may at any time specify the manner in which these records are to be maintained.

(b) Recipients shall submit quarterly reports describing their legislative activities conducted pursuant to these regulations, together with such supporting documentation as required by the Corporation, consistent with restrictions on disclosure of confidential

or privileged information imposed by applicable law of any state or other jurisdiction. The Corporation may at any time specify the form in which these reports are to be submitted.

#### § 1612.12 Enforcement.

(a) The Corporation shall have authority—

(1) To suspend or terminate the employment of an employee of the Corporation who violates the provisions of this part; and

(2) To impose such sanctions as are appropriate (including but not limited to recovery of questioned costs) for the enforcement of this regulation against a recipient which fails to ensure that its employees refrain from activities proscribed by the Act or by this part.

(b) The Corporation shall have authority in accordance with the procedures set forth in parts 1606, 1618, 1623 and 1625 of these regulations to suspend or terminate financial assistance or deny refunding to a recipient which fails to ensure that its employees refrain from activities proscribed by the Act or by this part. It shall also have authority to recover costs incurred by recipients as a result of activities proscribed by this part.

(c) A recipient shall—

(1) Advise employees about their responsibilities under this part; and

(2) Establish procedures for determining whether an employee has violated a provision of this part; and shall establish a policy, a copy of which shall be transmitted to the Corporation, for determining the appropriate sanction to be imposed for a violation, including—

(i) Administrative reprimand if a violation is found to be minor and unintentional, or otherwise affected by mitigating circumstances;

(ii) Suspension of termination of employment;

(iii) Other sanctions appropriate for the enforcement of this regulation; and

(3) Inform the Office of Monitoring, Audit, and Compliance within 30 days of imposing any sanction on any person for violation of this part; and

(4) Make available to the Corporation the records of its investigation of any allegation of violations whether or not any sanctions were imposed. Such records shall be submitted on a quarterly basis to the Office of Monitoring, Audit, and Compliance.

#### § 1612.13 Private Funds.

A recipient may use funds provided by private sources to engage in legislative or administrative lobbying if a government agency, elected official, or



legislative body, committee or member thereof is considering a measure directly affecting activities under the Act of the recipient or the Corporation.

Dated: July 25, 1986.

John H. Bayly, Jr.,  
General Counsel.

[FR Doc. 86-17124 Filed 7-31-86; 8:45 am]

BILLING CODE 6920-35-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MM Docket No. 85-370; RM-4954, RM-5046]

#### Radio Broadcasting Services; Thief River Falls and Warroad, MN

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allocates Channel 274C1 to Thief River Falls, MN, substitutes Channel 262C1 for 257A at Thief River Falls and modifies the license of Station KSNR to specify Channel 262C1 instead of 257A at Thief River Falls, MN, as the first and second wide area FM channels. This action is taken in response to requests filed by

Theodore S. Storck and Olmstead Broadcasting, Inc. A site restriction 19.5 kilometers east is required for the allocation of Channel 274C1 at Thief River Falls, MN. In addition, Channel 223C1 is allocated to Warroad, MN as its first FM channel in response to a request filed by Daniel DeMolee. Canadian concurrence has been obtained for the allocation of the above channels. With this action, this proceeding is terminated.

**DATES:** Effective September 2, 1986, the window period for filing applications for Channel 274C1 at Thief River Falls, MN and Channel 223C1 at Warroad, MN, will open on September 3, 1986, and close on October 2, 1986.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order, MM Docket No. 85-370, adopted July 14, 1986, and released July 24, 1986. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors,

International Transcription Service, (202) 857-3800, 2100 M Street, NW, Suite 140, Washington, D.C. 20037.

### List of Subjects in 47 CFR Part 73

Radio broadcasting.

### PART 73—[AMENDED]

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read:

Authority: 47 C.S.C. 154, 303.

2. Section 73.202(b) is amended by revising the entry for Thief River Falls, MN, and adding a new entry for Warroad, MN to read as follows:

#### § 73.202 Table of Allotments.

\* \* \* \* \*

(b) \* \* \*

Community	Channel No.
Thief River Falls, MN.....	262C1, 274C1
Warroad, MN.....	223C1

Federal Communications Commission.

Charles Schott,

Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 86-17225 Filed 7-31-86; 8:45 am]

BILLING CODE 6712-01-M



# Proposed Rules

Federal Register

Vol. 51, No. 148

Friday, August 1, 1986

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1065

#### Milk in the Nebraska-Western Iowa Marketing Area; Notice of Proposed Temporary Revision of Supply Plant Shipping Percentage

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed temporary revision of rule.

**SUMMARY:** This notice invites written comments on a proposal to revise temporarily certain provisions of the Nebraska-Western Iowa Federal milk order. The proposed action would reduce for September 1986 through March 1987 the percentage of supply plant receipts that must be transferred or diverted to pool distributing plants in order for the supply plant to maintain pool status. The action was requested by a supply plant operator in order to maintain the pool status of producers historically associated with the Nebraska-Western Iowa order.

**DATE:** Comments are due no later than August 8, 1986.

**ADDRESS:** Comments (two copies) should be sent to: Dairy Division, AMS, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250.

#### FOR FURTHER INFORMATION CONTACT:

Constance M. Brenner, Marketing Specialist, Dairy Division, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-7311.

**SUPPLEMENTARY INFORMATION:** The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of

the order on certain milk handlers and would tend to ensure that dairy farmers will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the provisions of § 1065.7(b)(3) of the order, the temporary revision of certain provisions of the order regulating the handling of milk in the Nebraska-Western Iowa marketing area is being considered for the months of September 1986 through March 1987.

All persons who desire to submit written data, views or arguments about the proposed revision should send two copies of their views to the Dairy Division, AMS, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250, by the 7th day after publication of this notice in the *Federal Register*. The period for filing comments is limited to seven days because a longer period would not provide the time needed to complete the required procedures and include September 1985 in the temporary revision period.

The comments that are sent will be made available for public inspection in the Dairy Division during regular business hours (7 CFR 1.27(b)).

The provisions proposed to be revised are the supply plant shipping percentages set forth in § 1065.7(b). The revisions would be applicable for the months of September 1986 through March 1987. The specific revisions would reduce the supply plant shipping percentage for the months of September 1986 through March 1987 by 10 percentage points from the present 40 to 30 percent.

Pursuant to the provisions of § 1065.7(b)(3), the supply plant shipping percentage as set forth in § 1065.7(b) may be increased or decreased by up to 20 percentage points during any month to encourage additional milk shipments needed to assure an adequate supply of milk to fluid handlers, or to prevent uneconomic shipments merely for the purpose of assuring that dairy farmers will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

Neu Cheese Company, a handler operating a supply plant historically pooled under the Nebraska-Western

Iowa order, requested that for the months of September 1986 through March 1987, the supply plant shipping percentage requirement be reduced by 10 percentage points.

Neu Cheese Company states that it has consistently supplied milk to the fluid market by shipping its share of milk to distributing plants from its supply plant. However, the handler states that it is having trouble finding fluid outlets at which to qualify its supply of milk for the period September 1986 through March 1987 because of a change in the ownership of a distributing plant traditionally supplied by Neu Cheese Company. Neu Cheese Company claims that the distributing plant's new management is requiring the supply plant operator to pay significant fees in order to pool milk on the basis of its sales to the distributing plant, and that Neu Cheese Company agree to deliver to the distributing plant a percentage of its milk supply substantially in excess of the market's Class I utilization percentage.

The handler states that in order to continue the pool status of producers long associated with the Nebraska-Western Iowa order, the pool supply plant shipping percentage must be temporarily reduced by 10 percentage points, from 40 percent of the supply plant's receipts to 30 percent.

Therefore, it may be appropriate to relax the aforementioned provisions of § 1065.7(b) for the months of September 1986 through March 1987 to prevent uneconomic shipments of milk, and to assure that dairy farmers long associated with the fluid milk market will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

#### List of Subjects in 7 CFR Part 1065

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Part 1065 continues to read as follows:

**Authority:** (Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674).

Signed at Washington, DC, on: July 29, 1986.

Edward T. Coughlin,

Director Dairy Division.

[FR Doc. 86-17322 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-02-M



## 7 CFR Part 1079

**Milk in the Iowa Marketing Area;  
Proposed Suspension of Certain  
Provisions of the Order****AGENCY:** Agricultural Marketing Service,  
USDA.**ACTION:** Proposed suspension of rule.

**SUMMARY:** This notice invites written comments on a proposal to suspend for the months of September through November 1986 portions of the Iowa Federal milk marketing order. The proposed suspension would eliminate the need for a supply plant operator to ship a percentage of its receipts to distributing plants during this period. Also, as a corollary action, the proposed suspension would increase the limits on the quantity of milk not needed for fluid (bottling) use that may be moved directly from farms to nonpool manufacturing plants and still be priced under the order. A cooperative association requested suspension in order to pool the milk of its members who have been historically associated with the market.

**DATE:** Comments are due no later than August 8, 1986.**ADDRESS:** Comments (two copies) should be filed with the Dairy Division, Agricultural Marketing Service, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250.**FOR FURTHER INFORMATION CONTACT:** Richard A. Glandt, Marketing Specialist, Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-4829.

**SUPPLEMENTARY INFORMATION:** The Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), the suspension of the following provisions of the order regulating the handling of milk in the Iowa marketing area, 7 CFR Part 1079, is being considered for September through November 1986:

1. In § 1079.7(b) the words "35 percent or more" as they appear in the paragraph.

2. In § 1079.13(d)(2) and (3), the words "50 percent in the months of September through November and" and the words "in other months" as they appear in each paragraph.

All persons who want to send written data, views or arguments about the proposed suspension should send two copies of them to the Dairy Division, Agricultural Marketing Service, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250, by the 7th day after publication of this notice in the *Federal Register*. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include September 1986 in the suspension period if this is found necessary.

The comments that are sent will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27 (b)).

**Statement of Consideration**

Associated Milk Producers, Inc. (AMPI), an association of producers, operates a supply plant regulated by the Iowa milk order. The cooperative has requested that the supply plant shipping requirement be relaxed for September through November 1986 so that a supply plant operator would not have to ship a percentage of its receipts of Grade A milk to distributing plants. Also, the cooperative asked that the 50-percent diversion limitation be suspended for this same period. The remaining diversion provisions in the order would permit 70 percent of a handler's producer milk receipts to be moved directly from farms to nonpool manufacturing plants and still be priced under the order.

The cooperative notes that its supply plant has, for many years, been associated with this market. This has been accomplished through a unit pooling arrangement with Mid-America Dairymen, Inc. (Mid-Am), whereby the total of all shipments to distributing plants by the two cooperatives are used to qualify all the supply plants named in the unit. AMPI says that it currently pools an average of 32 million pounds of milk per month in the Iowa order.

AMPI stated that Mid-Am has indicated that Mid-Am no longer needs AMPI milk for any sales commitments after August 31, 1986. AMPI notes that without this unit pooling arrangement, it is presently left with committed sales to distributing plants of approximately 2 million pounds per month. According to AMPI, even if the shipping percentage were reduced from 35 percent to 25 percent through a temporary revision of the shipping requirements, this would

pool only approximately 8 million pounds of its members' milk leaving approximately 22 million pounds not pooled. AMPI indicated that adoption of the proposed suspension during September through November would provide time to try to develop sufficient sales to distributing plants in order to meet a reduced shipping requirement in December 1986 and succeeding months.

AMPI stated that producer milk on the Iowa order has continued to increase at a greater percentage than Class I sales. AMPI notes that producer milk during the first six months of 1986 increased approximately 14 percent over the same period of 1985. During this same period, Class I sales were down about 1.5 percent. AMPI stated that in their opinion, the ratio of producer milk to Class I sales will be higher this fall, thereby requiring more milk to be moved to nonpool manufacturing plants. However, without the suspension of the diversion provisions, AMPI claims that much of its member milk would have to be pumped into the supply plant and then pumped back out again for transport to a manufacturing plant. AMPI contends that the extra handling involved adversely affects milk quality (more pumping than if diverted) and is an uneconomic means of pooling milk. Suspending the 50-percent diversion limit would alleviate these concerns and allow improved efficiencies, thus increasing returns to producers, according to the cooperative.

**List of Subjects in 7 CFR Part 1079**

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Part 1079 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

Signed at Washington, DC, on: July 29, 1986.

William T. Manley,

Deputy Administrator, Marketing Programs.

[FR Doc. 86-17380 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-02-M

**7 CFR Part 1137****Milk in the Eastern Colorado Marketing  
Area; Suspension of Certain  
Provisions of the Order****AGENCY:** Agricultural Marketing Service,  
USDA.**ACTION:** Proposed suspension of rule.

**SUMMARY:** This notice invites written comments on a proposal to continue through October 1986 a suspension of portions of the Eastern Colorado Federal



milk order. Provisions proposed to be suspended relate to the amount of milk not needed for fluid (bottling) use that may be moved directly from farms to nonpool manufacturing plants and still be priced under the order. Also proposed to be suspended for the same period is the "touch-base" requirement that each producer's milk be received at least three times each month at a pool distributing plant. Continuation of the suspension of the provisions was requested by a cooperative association representing producers supplying the market in order to prevent uneconomic movements of milk.

**DATE:** Comments are due on or before August 8, 1986.

**ADDRESS:** Comments (two copies) should be filed with the Dairy Division, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250.

**FOR FURTHER INFORMATION CONTACT:** Constance M. Brenner, Marketing Specialist, Dairy Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-7311.

**SUPPLEMENTARY INFORMATION:** The Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), the suspension of the following provisions of the order regulating the handling of milk in the Eastern Colorado marketing area is being considered for the months of August through October 1986:

1. In the first sentence of § 1137.12(a)(1), the words "from whom at least three deliveries of milk are received during the month at a distributing plant".

2. In the second sentence of § 1137.12(a)(1), the words "30 percent in the months of March, April, May, June, July, and December and 20 percent in other months of" and "distributing".

All persons who want to send written data, views or arguments about the proposed suspension should send two copies of them to the Dairy Division, Agricultural Marketing Service, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250, by

the 7th day after publication of this notice in the **Federal Register**. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include August 1986 in the suspension period.

The comments that are sent will be made available for public inspection in the Dairy Division office during normal business hours (7 CFR 1.27(b)).

#### Statement of Consideration

Mid-America Dairymen, Inc. (Mid-Am), an association of producers that supplies some of the market's fluid milk needs and handles some of the market's reserve milk supplies, requested the suspension. The suspension would continue to relax for the months of August through October 1986 the limit on the amount of producer milk that a cooperative association may divert from pool plants to nonpool plants, and remove the requirement that three deliveries of each producer's milk be received at a pool distributing plant each month.

The order now provides that a cooperative may divert a quantity of milk not in excess of 20 percent of the cooperative association's member milk received at pool distributing plants. Suspension of the requested language would allow up to 50 percent of a cooperative's member milk supply to be diverted to nonpool plants and remain eligible to share in the marketwide pool.

Mid-Am states that the volume of producer milk pooled on the Eastern Colorado order began to increase following the conclusion of the Milk Diversion Program in 1985, and has continued to increase during 1986. According to the cooperative, Eastern Colorado producer milk during the first 5 months of 1986 had increased 14.4 percent over the same period in 1985. At the same time, producer milk used in Class I had increased only 1.3 percent. Mid-Am states that as a result of increased milk production, there are ample supplies of local milk available to meet the fluid requirements of Denver-area distributing plants. The cooperative estimates that approximately 15 loads of producer milk produced in Kansas and Nebraska would have to be shipped to Eastern Colorado pool distributing plants each month in order to qualify Mid-Am producers for continued pool status. The cooperatives state that these shipments would displace Denver-area milk, which would have to be moved to surplus handling plants. Both movements, according to Mid-Am, would represent uneconomic movements of milk. Without the requested continued suspension, the

cooperative expects to incur substantial unnecessary cost for the movement of its milk solely for the purpose of pooling the milk of its members currently associated with the Eastern Colorado market.

#### List of Subjects in 7 CFR Part 1137

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Part 1137 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

Signed at Washington, DC, on: July 29, 1986.

**William T. Manley,**  
Deputy Administrator, Marketing Programs.  
[FR Doc. 86-17382 Filed 7-31-86; 8:45 am]  
BILLING CODE 3410-02-M

#### 7 CFR Part 1139

#### Milk in the Lake Mead Marketing Area; Proposed Suspension of Certain Provisions of the Order

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed suspension of rule.

**SUMMARY:** This notice invites written comments on a proposal to continue a suspension of certain diversion provisions of the Lake Mead Federal milk order. Provisions proposed to be suspended relate to the amount of milk not needed for fluid (bottling) use that may be moved directly from farms to nonpool manufacturing plants and still be priced under the order. Also proposed to be suspended is the "touch-base" requirement that at least one day's production of each producer's milk be received each month at a pool plant. The proposed continued suspension would be effective during August 1986 and until a proceeding to consider a merger of the Lake Mead and Great Basin milk orders is completed. The continued suspension of the provisions was requested by a cooperative association representing producers supplying the market in order to prevent uneconomic movements of milk.

**DATE:** Comments are due no later than August 8, 1986.

**ADDRESS:** Comments (two copies) should be filed with the Dairy Division, Agricultural Marketing Service, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250.

**FOR FURTHER INFORMATION CONTACT:** Constance M. Brenner, Marketing Specialist, Dairy Division, Agricultural Marketing Service, U.S. Department of



Agriculture, Washington, DC 20250, (202) 447-7311.

**SUPPLEMENTARY INFORMATION:** Prior document in this proceeding:

Notice of Hearing: Issued February 6, 1986; published February 11, 1986 (51 FR 5070).

The Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), the suspension of the following provisions of the order regulating the handling of milk in the Lake Mead marketing area is being considered for August 1986, and continuing until a hearing proceeding to consider a merger of the Lake Mead and Great Basin milk orders is completed:

In § 1139.13(d)(2), all of the language following the parenthetical phrase.

All persons who want to send written data, views or arguments about the proposed suspension should send two copies of them to the Dairy Division, Agricultural Marketing Service, Room 2968, South Building, U.S. Department of Agriculture, Washington, DC 20250, by the 7th day after publication of this notice in the *Federal Register*. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include August 1986 in the suspension period.

The comments that are sent will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27(b)).

#### Statement of Consideration

The proposed continued suspension would remove the limit on the amount of producer milk that a cooperative association may divert from pool plants to nonpool plants, and remove the requirement that at least one day's production of each producer's milk be received at a pool plant each month. The suspension was requested by Lake Mead Cooperative Association, which supplies some of the market's fluid milk needs and handles most of the market's reserve supplies.

The order now provides that a cooperative may divert a quantity of milk not in excess of 50 percent in the

months of March through July, and 40 percent in other months, of the producer milk delivered to or diverted from pool plants during the month. Continued suspension of the requested language would allow unlimited amounts of a cooperative's member milk supply to continue to be diverted to nonpool plants and remain eligible to share in the marketwide pool. The current suspension of the requested language has been in effect since February 1986.

A public hearing was held on March 18-20, 1986, in Salt Lake City, Utah, to consider a merger of the Great Basin and Lake Mead orders. The cooperative expects that the diversion provisions contained in the proposed merged order would offer a long-term solution to the problems of operating within the order's present diversion limits. Until the hearing proceeding is completed, however, the cooperative requests that the order's diversion limits and "touch-base" requirements be suspended to assure that all of the member milk of the cooperative is eligible to participate in marketwide pooling and pricing under the Lake Mead Federal order. The cooperative contends that the hearing supports such action.

The record of the public hearing shows that milk production pooled under the Lake Mead order during 1985 increased by approximately 23 percent, while producer milk used in Class I increased only 5 percent. The record also shows that the cooperative would not have been able to pool all of the milk of its member producers in the absence of the prior suspension of the provisions in question without resorting to uneconomic and inefficient milk hauling and handling. However, changes in marketing practices in the marketing area since the hearing, including the association of additional producers with the market, warrant giving interested persons an opportunity to comment on the desirability of a continued suspension of the requested provisions.

#### List of Subjects in 7 CFR Part 1139

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Part 1139 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

Signed at Washington, DC, on: July 29, 1986.

**William T. Manley,**

*Deputy Administrator, Marketing Programs.*

[FR Doc. 86-17381 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-02-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 36

[Docket No. 24929; Notice No. 86-3A]

### Noise Standards for Helicopters in the Normal, Transport and Restricted Categories

**AGENCY:** Federal Aviation Administration (FAA), (DOT).

**ACTION:** Notice of Proposed Rulemaking (NPRM); Reopening of Comment Period.

**SUMMARY:** This notice announces the reopening of the comment period for Notice of Proposed Rulemaking No. 86-3, which closed on June 5, 1986. That notice invited comments relative to the establishment of noise certification standards for civil helicopters in the normal, transport, and restricted categories and would provide noise level limits and test procedures for the issuance of original and amended type certificates. The notice also proposed to prohibit changes in type design of helicopters that might increase their noise levels beyond certain limits. While that notice contained several provisions similar to those contained in an earlier notice withdrawn in 1981, it differed from that noise in several important aspects. One of these is the absence of any proposal to limit the further manufacture of older non-complying helicopter types; another is the commonality between the proposed standards and those adopted by the International Civil Aviation Organization (ICAO). The FAA believes that these rules are necessary to provide current and future relief and protection to the public health and welfare from the noise of affected helicopters. This reopening is necessary to afford all interested parties additional time to present their views on the proposed rulemaking and to provide time for comments that may arise from the June ICAO meeting on Aviation Environmental Protection.

**DATE:** Comments must be received on or before September 2, 1986.

**ADDRESSES:** Send comments on the proposed rule in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, ATTN: Rules Docket (AGC-204), Docket No. 24929, 800 Independence Avenue, SW., Washington, DC 20591; Or deliver comments in duplicate to: FAA Rules Docket, Room 916, 800 Independence Avenue, SW., Washington, DC 20591.

All comments must be marked: Docket No. 24929. Comments may be examined



in the Rules Docket, weekdays except Federal holidays, between 8:30 a.m. and 5:00 p.m.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Richard Tedrick, Noise Policy and Regulatory Branch, (AEE-110), Noise Abatement Division, Office of Environment and Energy, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 755-9027.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested persons are invited to participate in this rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasonable regulatory decisions on the proposals. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposals. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made:

"Comments to Docket No. 24929." The post card will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### Availability of NPRMs

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426-8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of

Advisory Circular No. 11-1 which describes the application procedure.

##### Background

On March 6, 1986, the FAA published Notice No. 86-3 (51 FR 7878), which provide for a 90 day comment period, closing on June 5, 1986. In that notice the FAA proposed noise certification standards for civil helicopters certificated in the normal, transport, and restricted categories. The notice also proposed to prohibit changes in the design type of helicopters that might increase their noise levels beyond certain limits.

The FAA invited interested persons to submit comments and suggestions as to future action regarding this rulemaking. Since Notice 86-3 was published, a request from the Aerospace Industries Associations of America, Inc., has been received for an extension of the comment period due to the relationship of the proposed rule and issues to be discussed during the June ICAO committee meeting on Aviation Environmental Protection.

The FAA considers it vital to obtain the comments of all interested persons concerning the overall regulations, economic, environmental and energy aspects of the proposal and to obtain suggestions for improving it.

##### Conclusion

This notice reopens the comment period on the NPRM to afford interested persons with additional time in which to review and respond to Notice 86-3. For reasons discussed in Notice 86-3, the FAA has determined that this document: (1) Involves a proposal regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). In addition, it is certified that, under criteria of the Regulatory Flexibility Act, the proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities. Further, this proposal, if adopted, would have little or no impact on trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

##### Reopening of Comment Period

The FAA is informed that many interested parties have requested additional time to comment on the NPRM since it takes time to fully analyze the proposals so that all potential problem areas are identified and brought to the agency's attention.

In consideration of the above, the FAA concludes that the comment period should be reopened. Accordingly, the comment period for Notice 86-3 is reopened until September 2, 1986.

Issued in Washington, DC, on July 23, 1986.

Norman H. Plummer,

Director of Environment and Energy.

[FR Doc. 86-17304 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 86-NM-60-AD]

#### Airworthiness Directives; Boeing Model 767 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Amendment to Notice of Proposed Rulemaking (NPRM); and Extension of Comment Period.

**SUMMARY:** A Notice of Proposed Rulemaking (NPRM), Docket No. 86-NM-60-AD, was issued April 30, 1986, which proposed an airworthiness directive (AD) which would require replacement of the trolley roller and side track roller assemblies and the cable pulleys in the counterbalance system on certain Boeing Model 767 entry/service doors. This document amends the NPRM by adding a requirement to rework the aft roller side tracks on certain Boeing Model 767 entry/service doors. This action is prompted by the manufacturer reporting that, on some doors the operating loads are increased excessively when the aft side track roller is replaced as originally proposed by the NPRM. This document also extends the time for comments for the proposed rule.

**DATES:** Comment period for the NPRM, as amended, is extended and comments must be received no later than August 21, 1986.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-60-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124. The information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.



**FOR FURTHER INFORMATION CONTACT:**

Mr. Pliny Brestel, Aerospace Engineer, Airframe Branch, ANM-120S; telephone (206) 431-2931. Mailing Address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle Washington 98168.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact concerned with the substance of this proposal will be filed in the Rules Docket.

**Availability of NPRM**

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-60-AD, 17900 Pacific Highway South, C-68966, Seattle Washington 98168.

**Discussion**

Notice of Proposed Rulemaking, Docket No. 86-NM-60-AD, was published in the *Federal Register* on May 8, 1986 (51 FR 17052). This notice proposed to adopt an airworthiness directive (AD) that would require replacement of the trolley roller and side track roller assemblies and the cable pulleys in the counterbalance system on certain Boeing Model 767 entry/service doors. This action was prompted by reports of component failures, which could prevent the door from opening when required for emergency evacuation. Since issuance of the NPRM, the FAA has determined that it is necessary to trim the aft roller side track to ensure rotation of the aft side track roller as proposed in the original NPRM. This action is prompted by the manufacturer reporting that, on some doors the operating loads are increased excessively when the aft side track

roller is replaced as originally proposed by the NPRM.

Boeing issued Service Bulletin No. 767-52-0044 on June 27, 1986, which describes the modification of the aft roller side track by trimming the outboard edge of the track.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would require modification of the tracks in accordance with the service bulletin previously mentioned.

It is estimated that 63 airplanes of U.S. registry would require rework of the aft roller side tracks which would require 32 manhours per airplane to accomplish; at an estimated cost of \$40 per manhour, the cost impact of this revision to the NPRM on U.S. operators is estimated to be \$80,640. The cost impact of this proposal, as revised, is estimated to be \$80,640 plus \$154,320, as listed in the original notice, for a total of \$234,960.

For the reasons discussed above, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities because few, if any, Boeing Model 767 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

**List of Subjects in 14 CFR Part 39**

Aviation safety, Aircraft.

**The Proposed Amendment****PART 39—[AMENDED]**

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89

**§ 39.13 [Amended]**

2. By revising an NPRM published in the *Federal Register* on May 8, 1986 (51 FR 17052) document FR Doc. 86-10260, as follows:

**"BOEING:** Applies to the Model 767 series airplanes specified in the Boeing service bulletins listed below, certified in any category. To ensure proper entry/service door operation during emergency evacuation, accomplish the following within 9 months after the effective date of this AD, unless previously accomplished:

A. For airplanes listed in Boeing Service Bulletin 767-52-0032, dated September 13, 1985, remove and replace the entry/service door trolley roller and side track roller assemblies in accordance with Boeing Service Bulletin 767-52-0032, dated September 13, 1985, or later FAA-approved revisions.

B. For airplanes listed in Boeing Service Bulletin 767-52-0037, dated March 21, 1986, replace the counterbalance cable pulleys in accordance with Boeing Service Bulletin 767-52-0037, dated March 21, 1986, or later FAA-approved revisions.

C. For airplanes listed in Boeing Service Bulletin 767-52-0044, dated June 27, 1986, modify the aft roller side tracks in accordance with Boeing Service Bulletin 767-52-0044, dated June 27, 1986, or later FAA-approved revisions.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used with approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections and/or modifications required by this AD."

All persons affected by this proposal who have not already received copies of the manufacturer's service bulletins may obtain copies upon request to the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124-2207. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on July 24, 1986.

Joseph W. Harrell,

Acting Director, Northwest Mountain Region.

[FR Doc. 86-17303 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 774****Guidelines for Significant Revisions; Reopening of Comment Period on Petition To Initiate Rulemaking**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.



**ACTION:** Notice of reopening of comment period on a petition to initiate rulemaking.

**SUMMARY:** On June 13, 1986, the Office of Surface Mining Reclamation and Enforcement (OSMRE) published a notice (51 FR 21574) seeking public comments on a petition submitted pursuant to section 201(g) of the Surface Mining Control and Reclamation Act. This petition requested OSMRE to amend its regulations to establish guidelines for determining whether a proposed revision to an existing permit is significant. OSMRE has received clarification from the petitioners that the intent of this petition is to initiate national rulemaking. OSMRE has also received a request for an extension of the comment period.

**DATE:** OSMRE will accept written comments until 4:00 p.m. Eastern Daylight Time, September 2, 1986.

**ADDRESSES:** *Hand-deliver* to the Office of Surface Mining Reclamation and Enforcement, Division of Permit and Environmental Analysis, Room 5121, 1100 L Street NW., Washington, DC, or

*Mail* to the Office of Surface Mining Reclamation and Enforcement, Division of Permit and Environmental Analysis, Room 5121-L, 1951 Constitution Avenue NW., Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Catherine Roy, Division of Permit and Environmental Analysis, Office of Surface Mining Reclamation and Enforcement, telephone (202) 343-5143.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

OSMRE, through the Division of Tennessee Permitting, has been developing guidelines for use in Tennessee in determining whether proposed revisions to permits are significant. OSMRE received a petition for rulemaking indicating that such guidelines are rules and subject to the APA rulemaking process. However, the petition was unclear as to whether the requested rulemaking would be national in scope or limited to Tennessee. On June 13, 1986, OSMRE published a request for comments on the need for the rulemaking and on its scope (51 FR 21574). The petitioners have now

clarified that its intent is to initiate national rulemaking.

OSMRE also received a request for an extension of the public comment period. Because the scope has been clarified by the petitioners, OSMRE is reopening the comment period.

##### **II. Public Comment Procedures**

Written comments should be specific, should be confined to the need for the requested national rulemaking, and should explain the reasons for the comment. Persons who have already submitted comments on the need for this rulemaking do not need to resubmit them, unless they wish to amend their comments. The public is also referred to a companion notice in this **Federal Register** on proposed rulemaking on criteria for significant permit revisions.

OSMRE cannot ensure that written comments received after the close of the comment period (see "DATE") or delivered to any location other than that specified under "ADDRESSES" above will be considered and included in the administrative record on this petition.

##### **List of Subjects in 30 CFR Part 774**

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: July 29, 1986.

Brent Walquist,  
Assistant Director, Program Operations.  
[FR Doc. 86-17318 Filed 7-30-86; 8:45 am]  
BILLING CODE 4310-05-M

##### **30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, and 947**

**Surface Coal Mining and Reclamation Operations Under Federal programs in Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, and Washington**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Reopening comment period on a portion of the proposed rule.

**SUMMARY:** On August 5, 1985, the Office of Surface Mining Reclamation and Enforcement (OSMRE) published a notice of proposed rulemaking to update Federal programs promulgated under the Surface Mining Control and Reclamation Act to reflect section numbering changes

and rule content revisions made in OSMRE's permanent program rules during regulatory reform (50 FR 31674). OSMRE is reopening the comment period on the portion of these proposed rules pertaining to guidelines in determining the scale or extent of proposed permit revisions and in determining whether the proposed revision is significant.

**DATE:** OSMRE will accept written comments until 4:00 p.m. Eastern Daylight Time, September 2, 1986.

**ADDRESSES:** *Hand-deliver* to the Office of Surface Mining Reclamation and Enforcement, Administrative Record Room 5315, 1100 L Street NW., Washington, DC; or

*Mail* to the Office of Surface Mining Reclamation and Enforcement, Administrative Record Room 5315-L, 1951 Constitution Avenue NW., Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Mary Josie Smith, Chief, Branch of Federal Regulatory Activities, Division of Permit and Environmental Analysis; telephone (202) 343-5150.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The proposed rules, published August 5, 1985, (50 FR 31674), included guidelines to be used by the regulatory authority in determining whether a proposed revision to a permit for surface coal mining operations is significant. Applications for significant permit revisions have specific requirements in SMCRA and the existing regulations.

The proposed guidelines were listed under sections 910.774(b)(2), 912.774(b)(2), 921.774(b)(2), 922.774(b)(2), 933.774(b)(2), 937.774(b)(2), 939.774(b)(2), 941.774(b)(2), and 947.774(b)(2) in the 1985 notice. OSMRE now intends to reconsider those proposed guidelines in light of a petition for similar rulemaking (see a companion notice in this **Federal Register**).

##### **II. Public Comment Procedures**

Written comments should be specific and should include a reason for the comment. Comments should be confined to the proposed guidelines in the 1985 **Federal Register** notice (see Background). OSMRE cannot ensure that comments received after the close of the comment period (see "DATE") or



delivered to any location other than that specified in "ADDRESSES" will be considered and included in the administrative record.

Persons who have already submitted comments do not need to resubmit them, unless they wish to amend their comments. The public is also referred to a companion notice in this **Federal Register**.

Dated: July 29, 1986.

**Brent Walquist,**

*Assistant Director, Program Operations.*

[FR Doc. 86-17317 Filed 7-31-86; 8:45 am]

BILLING CODE 4310-05-M

### 30 CFR Part 950

#### Proposed Modifications to the Wyoming Permanent Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

**ACTION:** Reopening of public comment period.

**SUMMARY:** OSMRE is reopening the period for review and comment on modified portions of the Wyoming permanent regulatory program. On January 15, 1986 (51 FR 1816), OSMRE announced a public comment period and procedures for requesting a public hearing on the substantive adequacy of a proposed amendment to the Wyoming permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) submitted by Wyoming on December 13, 1985. The amendment submitted by Wyoming consists of modifications to the definition of "collateral bond" by allowing the use of personal property as an acceptable method of depositing collateral with the Administrator of the Wyoming Land Quality Division for the purpose of posting additional security for self-bonding purposes. OSMRE is reopening the comment period to allow the public an opportunity to comment on supplemental material relating to the proposed amendment submitted by Wyoming on June 10, 1986.

**DATE:** Written comments not received on or before August 18, 1986 will not necessarily be considered.

**ADDRESSES:** Written comments should be mailed or hand delivered to Mr. Jerry Ennis, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 100 East "B" Street, Casper, Wyoming 82601-1918.

Copies of the supplemental material submitted by Wyoming and other relevant documents are available for review at the Casper Field Office and the office of the State regulatory authority listed below. Monday through Friday, 8:00 a.m. to 4:00 p.m. excluding holidays. Each requestor may receive, free of charge, one single copy of the Wyoming amendment by contacting OSMRE's Casper Field office listed above.

Office of Surface Mining Reclamation and Enforcement, Administrative Record Room, Room 5124, 1100 "L" Street NW., Washington, DC 20240  
Wyoming Department of Environmental Quality, Land Quality Division, Herschler Officer Building, 122 W. 25th Street, Cheyenne, Wyoming 82002

#### FOR FURTHER INFORMATION CONTACT:

Mr. Jerry Ennis, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 100 East "B" Street, Casper, Wyoming 82601-1918; Telephone: (310) 261-5824.

**SUPPLEMENTARY INFORMATION:** The general background of the permanent regulatory program, the State program approval process, the Wyoming program and the conditional approval, can be found in the Secretary's Findings and conditional approval published in the November 26, 1980 **Federal Register** (45 FR 78637-78684).

On December 13, 1985, the State of Wyoming submitted to OSMRE a program amendment that revised Chapter XII, section 2 of the approved program regulations relating to the use of personal property as collateral when posting additional security for self-bonding.

The January 15, 1986 **Federal Register** announced receipt of the program modification by OSMRE as well as a public comment period (51 FR 1816). In that same notice OSMRE announced that a public hearing would be held only if requested. No requests were received and no hearing was held.

On June 10, 1986, Wyoming submitted additional material to further clarify the proposed amendment. Copies of the additional material are available at those locations listed under "ADDRESSES". OSMRE is reopening the comment period in order to allow the public an opportunity to review and comment on the additional material submitted to OSMRE by the State on June 10, 1986. Specifically, OSMRE is seeking comment on whether the material submitted by Wyoming on June 10, 1986, together with the proposed amendment submitted on December 13, 1985, satisfy the criteria for approval of

State program amendments at 30 CFR 732.15 and 732.17. If the proposed amendment is found by the Director to be in accordance with SMCRA and no less effective than the Federal regulations, the amendment will be approved by the Director and codified in 30 CFR Part 950 as part of the Wyoming permanent regulatory program.

#### List of Subjects in 30 CFR Part 950

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: July 28, 1986.

**Brent Walquist,**

*Assistant Director, Program Operations.*

[FR Doc. 86-17362 Filed 7-31-86; 8:45 am]

BILLING CODE 4310-05-M

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[A-1-FRL-3058-7]

#### Approval and Promulgation of Implementation Plans; Rhode Island; Disapproval of Alternative Reasonably Available Control Technology Determination

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to disapprove a State Implementation Plan (SIP) revision submitted by the State of Rhode Island. This revision is an alternative reasonably available control technology (RACT) determination involving relaxed emission limitations and an extension of the final compliance date for four paper and fabric coating lines at Arkwright Incorporated (Arkwright) in Fiskeville, Rhode Island.

EPA is proposing to disapprove this revision for the following reasons: (1) The revision request does not contain adequate support that the emission limitations already in Rhode Island's SIP for this source cannot feasibly be met. (2) The revision request does not contain adequate support that the compliance date extension to June, 1988 for the reformulation of coatings on one of Arkwright's coating lines is expeditious. (3) The revision request does not contain adequate support that a reformulation program or add-on control program is not feasible on two of Arkwright's coating lines. (4) The revision does not contain adequate support that a final compliance date extension to June 30, 1987 for the installation of control



equipment on one of Arkwright's coating lines is justifiable. As a result of this disapproval, Arkwright remains subject to the emission limitations and final compliance date found in Rhode Island Regulation No. 19, Subsection 19.3.1.

**DATES:** Comments must be received on or before September 2, 1986.

**ADDRESSES:** Comments may be mailed to Louis F. Gitto, Director, Air Management Division, Room 2312, JFK Federal Building, Boston, MA 02203. Copies of the submittal and EPA's evaluation are available for public inspection during normal business hours at the Environmental Protection Agency, JFK Federal Building, Room 2311, Boston, MA 02203; and the Department of Environmental Management, 75 Davis Street, Cannon Building, Room 204, Providence, Rhode Island 02908.

**FOR FURTHER INFORMATION CONTACT:** David B. Conroy (617) 223-4869, FTS 223-4869.

**SUPPLEMENTARY INFORMATION:** On July 6, 1983 (48 FR 31026), EPA approved Rhode Island's Ozone Attainment Plan and incorporated it into the SIP. As part of the attainment plan, Rhode Island adopted Regulation No. 19, "Control of Volatile Organic Compounds from Surface Coating Operations." A source subject to this regulation is required under Subsection 19.3.1 to apply RACT to its VOC emitting processes. The RACT limitations specified in Subsection 19.3.1 are equivalent to those specified in EPA's applicable Group 1 control techniques guidelines (CTG) document.

On November 18, 1985, the Rhode Island DEM submitted a revision to its SIP consisting of an administrative consent agreement between the DEM's Division of Air and Hazardous Materials and Arkwright of Fiskeville, Rhode Island. This consent agreement was issued pursuant to provisions in Rhode Island Regulation No. 19, Subsection 19.3.3 which allow the DEM to impose alternative compliance dates and emission limitations to those set forth in Subsection 19.3.1 on a case-by-case basis provided that certain conditions are met. The process commonly referred to as making an alternative RACT determination.

In order to qualify for an alternative RACT determination under Subsection 19.3.3, a source, at least 18 months prior to the final compliance date of July 1, 1985 set forth in Subsection 19.3.1, must have documented to the satisfaction of the DEM's Division of Air and Hazardous Materials that the applicable emission limitations set forth in Subsection 19.3.1 could not be met. This documentation involved demonstrating

both economically and technologically that neither coating reformulation nor the installation of a control system is feasible or even partially feasible.

Amendments to Rhode Island Regulation No. 19 which included Subsection 19.3.3 were submitted to EPA by Rhode Island on May 14, 1982. EPA approved these amendments on July 6, 1983 (48 FR 31026) as part of Rhode Island's Ozone Attainment Plan. It was EPA's intention when approving Subsection 19.3.3 that all compliance date extension and emission limitation relaxations granted pursuant to this subsection by the DEM would be submitted to EPA as SIP revisions and that any technical or economic analysis would be independently reviewed and evaluated by EPA. The DEM agrees that EPA has the authority to review such compliance date extensions and emission limitation relaxations.

#### Summary of SIP Revision

Arkwright Incorporated operates three existing paper and fabric coating lines (coater numbers 5, 6, and 7) in Fiskeville, Rhode Island. A fourth existing line (coater No. 4) is to be used as an emergency standby for coater No. 6. There is one additional line at Arkwright (coater No. 3) which was installed in 1984 and is subject to different control requirements than the existing lines. The lines are used for the coating of polyester fabrics and plastic films such as transparencies. Due to the nature of the substrates coated, the existing surface coating lines at Arkwright are subject to the control requirements of Rhode Island SIP Regulation No. 19. Rhode Island Regulation No. 19, Subsection 19.3.1 requires that the VOC content of each coating employed at Arkwright be at or below 2.9 pounds VOC/gallon of coating (minus water) by July 1, 1985 except as provided in Subsection 19.3.3. (Note: 2.9 pounds VOC/gallon of coating (minus water) is the emission limitation specified in EPA's control techniques guideline (CTG) document for such facilities.)

Pursuant to Subsection 19.3.3, the Rhode Island DEM has submitted a revision providing relaxed emission limitations and an extended compliance date for Arkwright. The DEM believes that the provisions of the consent agreement submitted as the SIP revision constitute an alternative RACT determination for the source.

Arkwright has primarily employed solvent-based coatings in its coating lines. During 1980, the first year this regulation became effective, the VOC emissions from this source were 1042 TPY. In 1984, the VOC emissions from

this source were 638 TPY with lines 5, 6 and 7 emitting 70 TPY, 191 TPY, and 377 TPY, respectively. Under the proposed consent agreement, Arkwright will be required to install an add-on control device on line 7 by June 30, 1987. This device should reduce approximately 320 TPY of VOC emissions from this line.

The consent agreement also requires Arkwright to reformulate the coatings used on line 6 by June, 1988. All other coatings on line 5 and on line 6 and 7, before reformulation or the installation of add-ons, would be subject to an emissions limit of 7.03 lbs VOC/gallon of coating (minus water). This limit will be reestablished on a yearly basis by the DEM to reflect VOC reductions Arkwright has achieved from its coatings.

The consent agreement also limits the operation of coater No. 4 to times when coater No. 6 is not in operation. The operation of coater No. 4 is allowed as long as Arkwright notifies the DEM prior to using the coater. The coatings used on coater No. 4 are subject to the 7.03 lbs VOC/gallon coating (minus water) emission limit.

#### SIP Deficiencies

As previously stated, EPA is proposing to disapprove this revision because of several deficiencies in the consent agreement negotiated with Arkwright. Each of the deficiencies is discussed below.

##### 1. Compliance Date Extension—Reformulation

The Rhode Island DEM has requested a compliance date extension to June 30, 1988 for Arkwright Incorporated to reformulate its coatings on coater No. 6. Section 172(b)(2) of the Clean Air Act (CAA) requires that all provisions of an implementation plan for a state relating to attainment and maintenance of national ambient air quality standards in any nonattainment areas must provide for the implementation of all reasonably available control measures as expeditiously as practicable. Therefore, for each individual compliance date extension request, EPA must determine whether or not the request does, in fact, evidence an expeditious timeframe.

EPA's technical criteria for evaluating compliance date extensions are set forth in an August 17, 1984 letter from Joseph Cannon, then Assistant Administrator for Air and Radiation, to Richard Lillquist, President of the Flexible Packaging Association. (This letter is available as part of the evaluative memorandum prepared on this revision. Copies may be obtained from the EPA



Regional Office listed in the **ADDRESSES** section of this notice.) In order to demonstrate that a compliance date extension represents an expeditious timeframe, the source must provide evidence of having made reasonable efforts to develop and/or install low-solvent technology at its facility from the time of adoption by the state of the applicable regulations without any significant periods of inaction. In addition, this letter states that in no case will a compliance date extension request extending beyond 1987 be considered expeditious. Further, a compliance date extension request must contain commitments to install add-on control equipment by a specified date if a low-solvent development program fails by a specified date. Rhode Island Regulation No. 19 was effective on November 13, 1979 and conditionally approved by EPA on May 7, 1981 (46 FR 25466). EPA fully approved Rhode Island Regulation No. 19 as part of Rhode Island's Ozone Attainment Plan on July 6, 1983 (48 FR 31026). Arkwright has not adequately described the steps it took to investigate the use of complying coatings since the adoption of Regulation No. 19. Without this detailed explanation, it is not possible to substantiate Arkwright's claim that it needs an extension beyond the July 1, 1985 final compliance date contained in Regulation No. 19. Additionally, EPA does not consider a compliance date extension request extending beyond December 31, 1987 to be expeditious and cannot approve such a request. Moreover, EPA cannot approve this request because there is no provision in Arkwright's consent agreement requiring the company to install add-on control equipment should the low solvent development program fail.

#### 2. Compliance Date Extension—Add-on Control

The Rhode Island DEM has requested a compliance date extension to June 30, 1987 for Arkwright Incorporated to install add-on controls on coater No. 7. The final compliance date in Regulation 19 is July 1, 1985. By this date, Arkwright should have installed add-on control equipment on coater No. 7. Arkwright claims it could not afford to install the add-on control equipment by July 1, 1985 and requested an extension pursuant to Rhode Island Regulation No. 19, Subsection 19.3.3. EPA has done an extensive review of economic and financial information submitted by Arkwright. That review has indicated that Arkwright had and continues to have the capability to make the expenditures necessary to install and operate add-on control equipment prior

to June 30, 1987. (The review is available as part of the evaluative memorandum prepared on this revision. Copies may be obtained from the EPA Regional Office listed in the **ADDRESSES** section of this notice). EPA does not consider a schedule for the installation of add-on control equipment which extends the compliance date 24 months after the final compliance date to be expeditious.

#### 3. Emission Limitation on Uncontrolled Lines

The Rhode Island DEM has requested an alternative emission limitation for the coatings used on coater No. 4, when it is allowed to operate, and on coater No. 5. The limit that the coatings on these lines must meet when operating is 7.03 lbs VOC/gallon coating (minus water). The DEM's Division of Air & Hazardous Materials will reestablish this limit on a yearly basis to reflect VOC reductions Arkwright has achieved from its coatings. Arkwright has not provided adequate support which shows that there are not any existing low/no solvent formulations which can meet Arkwright's needs on these two coaters. Furthermore, Arkwright has not provided adequate support which shows that add-on control equipment is not feasible on either or both of these coaters.

#### EPA Response

On June 28, 1985, EPA submitted comments on the consent agreement between the DEM and Arkwright at the public hearing that was held on this revision. EPA commented on the specific deficiencies of the consent agreement and stated that EPA did not believe the provisions of the consent agreement constituted RACT for this source. In its November 18, 1985 submittal, the DEM did not address all of EPA's comments made at the hearing. In a letter dated February 10, 1986, EPA reiterated its comments on Arkwright's consent agreement and recommended that the DEM withdraw the submittal. EPA stated that it would disapprove the submittal if the State did not withdraw it. On February 21, 1986, the State notified EPA that it still considers this SIP revision request pending.

#### Proposed Action

EPA is today proposing to disapprove the consent agreement submitted as a SIP revision request for Arkwright Incorporated in Fiskeville, Rhode Island for the following reasons:

1. The source has not demonstrated that the requested compliance date extension to June 30, 1988 for reformulation of coatings on coater No. 6 constitutes an expeditious schedule as

required by the CAA and Subsection 19.3.3 of the federally approved SIP for Rhode Island.

2. The source has not demonstrated that it needs a two year compliance date extension until June 30, 1987 for the installation of add-on control equipment on coater No. 7 as required by the CAA and Subsection 19.3.3 of the federally approved SIP for Rhode Island.

3. The source has not demonstrated that an add-on control program or a reformulation program is not feasible on coater No. 4 and coater No. 5 as required by Subsection 19.3.3 of the federally approved SIP for Rhode Island.

Pursuant to the provisions of 5 U.S.C. 605(b), I certify that this action will not have a significant economic impact on a substantial number of small entities because it affects only one source. In addition, this action imposes no additional requirements on the source.

Under Executive Order 12291, today's action is not "Major". It has been submitted to the Office of Management and Budget (OMB) for review.

#### List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Reporting and Recordkeeping requirements.

Dated: April 3, 1986.

Michael R. Deland,

Regional Administrator, Region I.

[FR Doc. 86-17351 Filed 7-31-86; 8:45 am]

BILLING CODE 5560-50-M

#### 40 CFR Part 716

[OPTS-84022; FRL-3058-1]

#### Health and Safety Data Reporting; Submission of Lists and Copies of Health and Safety Studies on Certain Substances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to add 107 chemical substances to the list of chemical substances and mixtures (henceforth referred to as substances) in the Health and Safety Data Reporting Rule, 40 CFR Part 716. Once EPA lists these substances in the Health and Safety Data Reporting Rule, past, current, and prospective manufacturers, importers, and processors of these substances would be required to provide EPA with lists and copies of unpublished health and safety studies on these substances. EPA will use this information to support a detailed



assessment of the health and environmental risks of these substances.

**DATE:** Written comments on this proposed rule should be submitted by September 30, 1986.

**ADDRESS:** Comments should bear the docket control number OPTS-84022 and should be submitted to: TSCA Public Information Office (TS-793), Office of Toxic Substances, Environmental Protection Agency, Rm. NE-G004, 401 M St. SW., Washington, DC 20460.

All written comments on this proposed rule will be available for public inspection in Rm. E-107 at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Edward A. Klein, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-543, 401 M St. SW., Washington, DC 20460

Toll free: (800-424-9065), In Washington, DC: (554-1404)

Outside the USA: (Operator-202-554-1404).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

**A. On Rule**

Under section 8(d) of the TSCA, EPA issued the model Health and Safety Data Reporting Rule (40 CFR Part 716). The section 8(d) model rule requires past, current and prospective manufacturers, importers, and processors of listed chemical substances to submit to EPA copies and lists of unpublished health and safety studies on the listed substances that they manufacture, import, or process. These studies furnish EPA with useful information and have provided significant support for EPA's decisionmaking under TSCA sections 4, 5, 6, 8, and 9.

As part of an effort to coordinate information gathering requests from different offices in EPA and other Federal agencies, EPA has included in this proposed rule chemicals nominated by the Office of Toxic Substances, the Office of Drinking Water, the Office of Water Regulations and Standards, the Office of Solid Waste, and the Consumer Product Safety Commission. This coordination will lead to resource savings for both industry and the government by avoiding duplicative information requests by multiple offices in EPA or other Federal agencies. This savings will be reflected in reduced

Agency implementation costs and industry reporting costs.

A list of the chemicals to be added and their nominating office(s) is given in Unit II of this proposed rule. This list represents an initial effort in coordinating the assessment activities of all officers in EPA, as well as certain other Federal agencies. It incorporates a backlog of requests for health and safety information and covers many currently identified Agency health and safety data needs for Fiscal Years 1986, 1987 and in some cases, 1988.

Though there will be future additions to the Health and Safety Data Reporting Rule which encompass information requests from multiple offices and/or agencies, EPA does not anticipate future additions will again entail such an extensive list of chemicals. Other than the automatic additions which result from the receipt of the Interagency Testing Committee's (ITC's) Reports, EPA will continue to propose amendments to the Health and Safety Data Reporting Rule on an as needed basis.

**B. On Nominated Chemicals**

Prior to listing the chemicals in this proposed rule, information searches of several governmental chemical data bases were conducted by EPA to determine if the information needed by the requesting office was available. The list of chemicals was also given to other officers and programs in EPA requesting previously unavailable unpublished information for any of the listed chemicals. Thirty-eight chemicals were eliminated from the original list after the nominating office determined that the information provided met their needs. Only if the information needed on a chemical was unavailable, or the available information did not meet the particular needs of the nominating office, was the chemical retained on the list.

The particular reasons for each office's information request on the substances listed in this proposed rule are discussed below.

**1. Office of Toxic Substances (OTS)**

OTS has requested information on 26 diisocyanates. There is a concern about the potential for widespread human exposure to diisocyanates. With a few exceptions, toxicologic and health effects data are available only for toluene diisocyanate (TDI) and polymeric methylene diphenyl diisocyanate (MDI). The health effects

of greatest concern for these substances are those resulting from acute and chronic exposure, including respiratory tract effects, dermal irritation, nose and eye irritation, neurotoxic effects, hepatic, renal, and hematologic changes, and immune-mediated physiologic and pathologic changes.

The information obtained on these substances will help OTS to quantitatively and qualitatively analyze risks posed by them.

**2. Office of Water (OW)**

The information requested on the 34 chemicals nominated by the Office of Water is necessary to develop drinking water regulations, health advisories and ambient water criteria for aquatic and human health. Available toxicological information about these chemicals is variable in quality and quantity, and in some instances inadequate for proper scientific assessment of toxicity. Toxicity assessment requires the evaluation of acute, subchronic and chronic studies in rodents with respect to its target organs. The primary health concerns are damage to the central nervous system, liver, kidneys, and/or adrenals, and testicular toxicity. Toxicity data on additional effects such as teratogenesis, mutagenesis, reproductive effects and metabolism must be assessed since they may make a significant contribution to toxicity assessment of these chemicals.

**3. Office of Solid Waste (OSW)**

OSW needs health and environmental effects data for the development of background documents and Federal Register notices for their Listing Program. The Listing Program in the EPA Office of Solid Waste analyzes industrial wastes and their constituents and develops the background information, rationales and support documents needed to add waste streams to the list of hazardous wastes from non-specific sources (40 CFR 261-31), or hazardous wastes from specific sources (40 CFR 261.32). The identification and listing of these industrial waste streams as hazardous results in their regulation under the authority of RCRA. OSW is particularly concerned with carcinogenicity, teratogenicity, reproductive effects, and chronic and systemic health effects data. They also need information on environmental effects, aquatic toxicity, environmental fate, persistence and bioaccumulation. The existing literature yields only inconclusive or no data on the 35



chemical nominated by OSW for this rule.

#### 4. Consumer Product Safety Commission (CPSC)

The 12 chemicals nominated by CPSC are found in a variety of consumer products such as deodorizers, paints, adhesives, textiles, flame retardants, dyes, solvents, and plastics, and are known or suspected of producing chronic effects in animals or adverse human health effects. CPSC hopes this rule will provide the information that will help in evaluating potential consumer health risks from exposure to these chemicals. This information is not currently available in the published literature.

#### II. Summary of This Rule

This proposed rule would add 107 chemical substances to the list of substances in 40 CFR 716.17.

By listing these substances in the section 8(d) model rule, EPA would trigger the model rule's reporting requirements for past, current, and prospective manufacturers, importers, and processors of these substances. The model rule requires manufacturers, importers, and processors of listed substances to submit data within 60 days of the effective date of any amendment to the model rule.

The nominated chemicals are listed by CAS number below with the requesting office(s) noted:

CAS No.	Chemical name	Requesting office*
67-63-0	2-Propanol	OSW
67-86-3	Methane, trichloro-	ODW/OWRS
74-83-9	Methane, bromo-	ODW
74-95-3	Methane, dibromo-	ODW
74-97-5	Methane, bromochloro-	ODW
75-00-3	Ethane, chloro-	ODW
75-04-7	Ethanamine	OSW
75-25-2	Methane, tribromo-	ODW/OWRS
75-27-4	Methane, bromodichloro-	ODW/OWRS
75-29-6	Propane, 2-chloro-	OSW
75-34-3	Methane, 1,1-dichloro-	ODW/OWRS
75-69-4	Methane, trichlorofluoro-	ODW/OWRS
75-71-8	Methane, dichlorodifluoro-	ODW/OWRS
76-01-7	Ethane, pentachloro-	ODW
78-88-6	1-Propene, 2,3-dichloro-	OSW
78-97-7	Propanenitrile, 2-hydroxy-	OSW
79-00-5	Ethane, 1,1,2-trichloro-	ODW/OWRS/OTS
79-34-5	Ethane, 1,1,2,2-tetrachloro-	ODW/OWRS
90-42-6	[1,1'-Bicyclohexyl]-2-one	OSW
91-08-7	Benzene, 1,3-diisocyanato-2-methyl-	OTS
91-20-3	Naphthalene	ODW
91-97-4	1,1'-Biphenyl, 4,4'-diisocyanato-3,3'-dimethyl-	OTS
92-69-3	[1,1'-Biphenyl]-4-ol	OSW
92-84-2	10H-Phenothiazine	OSW
92-87-5	[1,1'-Biphenyl]-4,4'-diamine	OWRS
96-18-4	Propane, 1,2,3-trichloro-	ODW
97-18-7	Phenol, 2,2'-thiobis[4,6-dichloro-	CPSC
97-23-4	Phenol, 2,2'-methylenebis[4-chloro-	CPSC

#### —Continued

CAS No.	Chemical name	Requesting office*
98-01-1	2-Furancarboxaldehyde	OSW
98-06-6	Benzene, (1,1-dimethylethyl)-	ODW
98-83-9	Benzene, (1-methylethyl)-	OSW
99-87-6	Benzene, 1-methyl-4-(1-methylethyl)-	ODW
100-48-1	4-Pyridinecarbonitrile	OSW
100-54-9	3-Pyridinecarbonitrile	OSW
100-70-9	2-Pyridinecarbonitrile	OSW
101-20-2	Urea, N-(4-chlorophenyl)-N',N',4'-dichlorophenyl]CPSC	CPSC
101-68-8	Benzene, 1,1'-methylenebis[4-isocyanato-	OTS
104-49-4	Benzene, 1,4-diisocyanato-	OTS
104-51-8	Benzene, butyl-	ODW
104-76-7	1-Hexanol, 2-ethyl-	OSW
105-60-2	2H-Azepin-2-one, hexahydro-	OSW
106-43-4	Benzene, 1-chloro-4-methyl-	ODW
107-06-2	Ethane, 1,2-dichloro-	OWRS
108-60-1	Propane, 2,2'-oxybis[1-chloro-	ODW
108-86-1	Benzene, bromo-	ODW
108-95-2	Phenol	OWRS
109-87-5	Methane, dimethoxy-	CPSC
109-89-7	Ethanamine, N-ethyl-	OSW
111-69-3	Hexanedinitrile	OSW
111-92-2	1-Butanamine, N-butyl-	CPSC
120-12-7	Anthracene	OSW
121-44-8	Ethanamine, N,N-diethyl-	OSW
121-47-1	Benzenesulfonic acid, 3-amino-	OSW
122-66-7	Hydrazine, 1,2-diphenyl-	OWRS
123-61-5	Benzene, 1,3-diisocyanato-	OTS
124-48-1	Methane, dibromochloro-	ODW
127-18-4	Ethane, tetrachloro-	OWRS
129-00-0	Pyrene	OSW
135-98-8	Benzene, (1-methylpropyl)-	ODW
137-26-8	Thioperoxydicarbonic diamide tetramethyl-	CPSC
139-25-3	Benzene, 1,1'-methylenebis[4-isocyanato-3-methyl-	OTS
472-41-3	Phenol, 4-(3,4-dihydro-2,2,4-trimethyl-2H-1-benzopyran-4-yl)-	OSW
506-96-7	Acetyl bromide	OSW
530-50-7	Hydrazine, 1,1-diphenyl-	OWRS
534-07-8	2-Propanone, 1,3-dichloro-	OSW
540-54-5	Propane, 1-chloro-	OSW
540-84-1	Pentane, 2,2,4-trimethyl-	CPSC
542-75-6	1-Propene, 1,3-dichloro-	OSW
580-51-8	[1,1'-Biphenyl]-3-ol	OSW
584-84-9	Benzene, 2,4-diisocyanato-1-methyl-	OTS
598-21-0	Acetyl bromide, bromo-	OSW
630-20-6	Ethane, 1,1,1,2-tetrachloro-	ODW/OWRS
685-91-6	Acetamide, N,N-diethyl-	OSW
812-03-3	Propane, 1,1,1,2-tetrachloro-	OSW
822-06-0	Hexane, 1,6-diisocyanato-	OTS
828-00-2	1,3-Dioxan-4-ol, 2,6-dimethyl-, acetate-	CPSC
1070-78-6	Propane, 1,1,1,3-tetrachloro-	OSW
1208-52-2	Benzenamine, 2-[(4-aminophenyl)methyl]-	OSW
1200-71-6	Phenol, dimethyl-	OWRS
1321-38-6	Benzene, diisocyanatomethyl- (unspecified isomer), [1,1'-Biphenyl]/4,4'-diamino, dichloro-	OTS
1331-47-1	Benzene, 1,1'-methylenebis[2-isocyanato-	OWRS
2536-05-2	Cyclohexane, 1,4-diisocyanato-	OTS
2556-36-7	Benzene, 1,3-bis(1-isocyanato-1-methylethyl)-	OTS
2778-42-9	Naphthalene, 1,5-diisocyanato-	OTS
3173-72-6		

#### —Continued

CAS No.	Chemical name	Requesting office*
3296-90-0	1,3-Propanediol, 2,2-bis(bromomethyl)-	CPSC
4098-71-9	Cyclohexane, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethyl-	OTS
5124-30-1	Cyclohexane, 1,1'-methylenebis[4-isocyanato-	OTS
5873-54-1	Benzene, 1-isocyanato-2-[(4-isocyanatophenyl)methyl]-	OTS
7440-28-0	Thallium	OWRS
7440-48-4	Cobalt	OWRS
9016-87-9	Isocyanic acid, polymethylenepolyphenylene ester	OTS
10347-54-3	Cyclohexane, 1,4-bis(isocyanatomethyl)-	OPTS
10436-39-2	1-Propene, 1,1,2,3-tetrachloro-	OSW
12001-85-3	Napthenic acids, zinc salts	CPSC
15646-96-5	Hexane, 1,6-diisocyanato-2,4,4-trimethyl-	OTS
16938-22-0	Hexane, 1,6-diisocyanato-2,2,4-trimethyl-	OTS
18495-30-2	Propane, 1,1,2,3-tetrachloro-	OSW
19660-16-3	2-Propenoic acid, 2,3-dibromopropyl ester	CPSC
26447-40-5	Benzene, 1,1'-methylenebis(isocyanato-	OTS
26471-62-5	Benzene, 1,3-diisocyanatomethyl-	OTS
26530-20-1	3(2H)-Isothiazolone, 2-octyl-	CPSC
26952-23-8	1-Propene, dichloro-	OSW
32052-51-0	Isocyanic acid, trimethylcyclonexyl ester	OTS
38661-72-2	Cyclohexane, 1,3-bis(isocyanatomethyl)-	OTS
75790-84-0	Benzene, 2-isocyanato-4-[(4-isocyanatophenyl)methyl]-1-methyl-	OTS
75790-87-3	Benzene, 1-isocyanato-2-[(4-isocyanatophenyl)thio]-	OTS

\*CPSC = Consumer Product Safety Commission.  
OSW = Office of Solid Waste, EPA.  
OTS = Office of Toxic Substances, EPA.  
ODW = Office of Drinking Water, EPA.  
OWRS = Office of Water Regulations and Standards, EPA.

#### III. Reporting Requirements

Detailed guidance for reporting unpublished health and safety data is provided in 40 CFR Part 716. Also found in Part 716 are reporting exemptions. Listed below are the general reporting requirements of the section 8(d) model rule.

1. Persons who, in the 10 years preceding the date a substance is listed, either had proposed to manufacture, import, or process, or had manufactured, imported, or processed, the listed substance must submit a copy of each unpublished health and safety study which is in their possession at the time the substance is listed.

2. Persons who, at the time the substance is listed, propose to manufacture, import, or process, or are manufacturing, importing, or processing the listed substance must submit to EPA:



a. A copy of each unpublished health and safety study which is in their possession at the time the substance is listed.

b. A list of unpublished health and safety studies known to them but not in their possession at the time the substance is listed.

c. A list of health and safety studies that are ongoing at the time the substance is listed and are being conducted by or for them.

d. A list of health and safety studies that are initiated after the date the substance is listed and are conducted by or for them.

e. A copy of each unpublished health and safety study that was previously listed as ongoing or subsequently initiated and is now complete—regardless of completion date.

3. Persons who, after the time the substance is listed, propose to manufacture, import, or process the listed substance must submit to EPA:

a. A copy of each unpublished health and safety study which is in their possession at the time they propose to manufacture, import, or process the listed substance.

b. A list of unpublished health and safety studies known to them but not in their possession at the time they propose to manufacture, import, or process the listed substance.

c. A list of health and safety studies that are ongoing at the time they propose to manufacture, import, or process the listed substance, and are being conducted by or for them.

d. A list of health and safety studies that are initiated after the time they propose to manufacture, import, or process the listed substance, and are conducted by or for them.

e. A copy of each unpublished health and safety study that was previously listed as ongoing or subsequently initiated and is now complete—regardless of the completion date.

#### IV. Economic Impact

EPA estimates that the establishment of section 8(d) reporting requirements for the substances listed in Unit II of this proposed rule, would cost industry approximately \$353,987. This cost estimate is relatively high, because the Agency is uncertain about the likely number of respondents to the rule. Although EPA has used the best available data to make its economic projections, much of those data are not current. Therefore, if the Agency's estimate of regulatory impact is somewhat inaccurate, EPA intends to overestimate rather than underestimate that impact.

Nevertheless, the cost of this rule is low in comparison with its potential benefits. Health and safety studies concerning the listed substances would improve EPA's ability to identify and evaluate potential public health and environmental problems with regard to these substances. The Agency therefore would be better able to determine whether further regulatory action would be necessary.

The studies would help CPSC in evaluating potential consumer health risks from exposure to these chemicals.

The costs for reporting are broken down as follows:

Initial corporate review.....	\$65,790
Site identification.....	49,113
File search.....	95,337
Title listing.....	6,099
Photocopying.....	19,838
Managerial review.....	98,226
Ongoing reporting.....	19,584
<b>Total.....</b>	<b>\$353,987</b>

#### V. Public Record

The following documents constitute the public record for this proposed rule (docket control number OPTS-84022). All of these documents, including the index to the public record, are available to the public in the OTS Public Information Office from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The OTS Public Information Office is located at EPA Headquarters, Rm. E-107, 401 M St. SW., Washington, DC. The public record includes the following information considered by the Agency in developing this proposed rule.

1. This proposed rule.
  2. The economic analysis for this rule.
- EPA will identify the complete rulemaking record on or before the date of promulgation of the regulation.

#### VI. Regulatory Assessment Requirements

##### A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore requires a regulatory impact analysis. The Agency has determined that this proposed rule, if promulgated, is not "major" because it does not have an effect of \$100 million or more on the economy. EPA also anticipates that this proposed rule, if promulgated, will not have a significant effect on competition, costs, or prices.

This proposed regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

#### B. Regulatory Flexibility Act

This proposed rule will not have a significant economic impact on a substantial number of small entities. In a study of submitters reporting under the section 8(d) model rule, EPA found that only 1 of 69 submitters had less than \$100 million in annual sales. EPA does not expect this proposed amendment to affect this distribution. Therefore, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), EPA has determined that this rule will not have a significant economic impact on a substantial number of small entities.

#### C. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this proposed rule under the provisions of Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. and has assigned OMB Control Number 2070-0004. Comments on these requirements should be submitted to the Office of Information and Regulatory Affairs of OMB, marked "Attention: Desk Officer for EPA". The final rule package will respond to any OMB or public comments on the information collection requirements.

#### List of Subjects in 40 CFR Part 716

Chemicals, Health and safety data, Environmental protection, Hazardous substances, Recordkeeping and reporting requirements.

Dated: July 24, 1986.

John A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

#### PART 716—[AMENDED]

Therefore, it is proposed that 40 CFR Part 716 be amended as follows:

1. The authority citation for Part 716 continues to read as follows:

Authority: 15 U.S.C. 2607(d).

2. By adding paragraphs (a)(18) and (c)(2) to § 716.17 to read as follows:

**§ 716.17 Substances and listed mixtures to which this subpart applies.**

(a) \* \* \*

(18) As of the date 44 days after the date of publication of the Final Rule in the Federal Register, the following chemical substances are added to this Subpart:

CAS No.	Chemical name
67-63-0.....	2-Propanol
67-66-3.....	Methane, trichloro-
74-83-9.....	Methane, bromo-
74-95-3.....	Methane, dibromo-
74-97-5.....	Methane, bromochloro-



## —Continued

CAS No.	Chemical name
75-00-3	Ethane, chloro-
75-04-7	Ethanamine
75-25-2	Methane, tribromo-
75-27-4	Methane, bromodichloro-
75-29-6	Propane, 2-chloro-
75-34-3	Ethane, 1,1-dichloro-
75-69-4	Methane, trichlorofluoro-
75-71-8	Methane, dichlorodifluoro-
76-01-7	Ethane, pentachloro-
78-88-6	1-Propene, 2,3-dichloro-
78-97-7	Propanenitrile, 2-hydroxy-
79-00-5	Ethane, 1,1,2-trichloro-
79-34-5	Ethane, 1,1,2,2-tetrachloro-
90-42-6	[1,1'-Bicyclohexyl]-2-one
91-08-7	Benzene, 1,3-diisocyanato-2-methyl-
91-20-3	Naphthalene
91-97-4	1,1'-Biphenyl, 4,4'-diisocyanato-3,3'-di-methyl-
92-69-3	[1,1'-Biphenyl]-4-ol
92-84-2	10H-Phenothiazine
92-87-5	[1,1'-Biphenyl]-4,4'-diamine
96-18-4	Propane, 1,2,3-trichloro-
97-18-7	Phenol, 2,2'-thiobis[4,6-dichloro-
97-23-4	Phenol, 2,2'-methylenebis[4-chloro-
98-01-1	2-Furancarboxaldehyde
98-06-6	Benzene, (1,1-dimethylethyl)-
98-83-9	Benzene, (1-methylethyl)-
99-87-6	Benzene, 1-methyl-4-(1-methylethyl)-
100-48-1	4-Pyridinecarbonitrile
100-54-9	3-Pyridinecarbonitrile
100-70-9	2-Pyridinecarbonitrile
101-20-2	Urea, N-(4-chlorophenyl)-N'-(3,4-dichloro-phenyl)-
101-68-8	Benzene, 1,1'-methylenebis[4-isocyanato-]
104-49-4	Benzene, 1,4-diisocyanato-
104-51-8	Benzene, butyl-
104-76-7	1-Hexanol, 2-ethyl-
105-60-2	2H-Azepin-2-one, hexahydro-
106-43-4	Benzene, 1-chloro-4-methyl-
107-06-2	Ethane, 1,2-dichloro-
108-60-1	Propane, 2,2'-oxybis[1-chloro-
108-86-1	Benzene, bromo-
108-95-2	Phenol
109-87-5	Methane, dimethoxy-
109-89-7	Ethanamine, N-ethyl-
111-69-3	Hexanedinitrile
111-82-2	1-Butanamine, N-butyl-
120-12-7	Anthracene
121-44-8	Ethanamine, N,N-diethyl-
121-47-1	Benzenesulfonic acid, 3-amino-
122-66-7	Hydrazine, 1,2-diphenyl-
123-61-5	Benzene, 1,3-diisocyanato-
124-48-1	Methane, dibromochloro-
127-18-4	Ethane, tetrachloro-
129-00-0	Pyrene
135-98-8	Benzene, (1-methylpropyl)-
137-26-8	Thioperoxydicarbonyl diamide tetra-methyl-
139-25-3	Benzene, 1,1'-methylenebis[4-isocyanato-3-methyl-
472-41-3	Phenol, 4-(3,4-dihydro-2,2,4-trimethyl-2H-1-benzopyran-4-yl)-
506-96-7	Acetyl bromide
534-07-6	2-Propanone, 1,3-dichloro-
540-54-5	Propane, 1-chloro-
540-84-1	Pentane, 2,2,4-trimethyl-
542-75-6	1-Propene, 1,3-dichloro-
580-51-8	[1,1'-Biphenyl]-3-ol
584-84-9	Benzene, 2,4-diisocyanato-1-methyl-
598-21-0	Acetyl bromide, bromo-
630-20-6	Ethane, 1,1,1,2-tetrachloro-
685-91-8	Acetamide, N,N-diethyl-
812-03-3	Propane, 1,1,1,2-tetrachloro-
822-06-0	Hexane, 1,6-diisocyanato-
828-00-2	1,3-Dioxan-4-ol, 2,6-dimethyl-, acetate
1070-78-6	Propane, 1,1,1,3-tetrachloro-
1208-52-2	Benzenamine, 2-[(4-aminophenyl)methyl]-
1300-71-6	Phenol, dimethyl-
2536-05-2	Benzene, 1,1'-methylenebis[2-isocyanato-]
2556-36-7	Cyclohexane, 1,4-diisocyanato
3173-72-6	Naphthalene, 1,5-diisocyanato-
3296-90-0	1,3-Propanediol, 2,2-bis(bromoethyl)-
4098-71-9	Cyclohexane, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethyl-
5124-30-1	Cyclohexane, 1,1'-methylenebis[4-isocyanato-]
5873-54-1	Benzene, 1-isocyanato-2-[(4-isocyanatophenyl)methyl]-
7440-28-0	Thallium

## —Continued

CAS No.	Chemical name
7440-48-4	Cobalt
9016-87-9	Isocyanic acid, polymethylenepolyphenylene ester
10347-54-3	Cyclohexane, 1,4-bis(isocyanatomethyl)-
10436-39-2	1-Propene, 1,1,2,3-tetrachloro-
12001-85-3	Naphtenic acids, zinc salts
15646-96-5	Hexane, 1,6-diisocyanato-2,4,4-trimethyl-
16938-22-0	Hexane, 1,6-diisocyanato-2,2,4-trimethyl-
18495-30-2	Propane, 1,1,2,3-tetrachloro-
19660-16-3	2-Propenoic acid, 2,3-dibromopropyl ester
26447-40-5	Benzene, 1,1'-methylenebis(isocyanato-)
26471-62-5	Benzene, 1,3-diisocyanatomethyl-
26530-20-1	3(2H)-isothiazolone, 2-octyl-
26952-23-8	1-Propene, dichloro-
38661-72-2	Cyclohexane, 1,3-bis(isocyanatomethyl)-
75790-84-0	Benzene, 2-isocyanato-4-[(4-isocyanatophenyl)methyl]-1-methyl-
75790-87-3	Benzene, 1-isocyanato-2[(4-isocyanatophenyl)thio]-

(c) \* \* \*

(2) *Substances not on the TSCA Chemical Substance Inventory.* As of the date 44 days after the date of publication of the final rule in the **Federal Register**, the following chemical substances are added to this Subpart. The provisions of § 716.11(e) do not apply to these substances.

CAS No.	Chemical name
530-50-7	Hydrazine, 1,1-diphenyl-
1321-38-6	Benzene, diisocyanatomethyl-(unsaturated isomer)
1331-47-1	[1,1'-Biphenyl]-4,4'-diamino, dichloro-
2778-42-9	Benzene, 1,3-bis(1-isocyanato-1-methyl-ethyl)-
32052-51-0	Isocyanic acid, trimethylcyclohexyl ester

[FR Doc. 86-17352 Filed 7-31-86; 8:45 am]

BILLING CODE 6560-50-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 0, 1, 21, 22, 23, 62, 73, and 74

[Gen. Docket No. 86-285]

### Establishment of a Fee Collection Program To Implement the Provisions; Correction

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; correction.

**SUMMARY:** On July 16, 1986, the Commission published a Notice of Proposed Rule Making (FCC No. 86-301) on page 25792. Through inadvertence, the deadline for filing comments and reply comments were transposed.

**DATES:** The correct date for comments is August 15, 1986 and the correct date for replies is September 2, 1986.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Brent Weingardt (202) 632-3906.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 86-17229 Filed 7-31-86; 8:45 am]

BILLING CODE 6712-01-M

## 47 CFR Part 1

[CC Docket No. 86-212]

### Attachment of Cable Television Hardware to Utility Poles; Extension

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; order granting extension of time for filing comments.

**SUMMARY:** In response to a request by the National Cable Television Association, Inc., the Commission's Common Carrier Bureau has granted a 30-day extension of time for filing comments on matters discussed in the Commission's Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles in CC Docket No. 86-212, published on June 16, 1986, 51 FR 21774. The extension also established a new date for filing reply comments.

**DATES:** Comments are now due by August 27, 1986, and reply comments by September 11, 1986.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Bert Weintraub or Suzan Friedman (202) 632-4887.

## Order

In the matter of amendment of rules and policies governing the attachment of cable television hardware to utility poles.

Adopted: July 22, 1986.

Released: July 23, 1986.

By the Chief, Common Carrier Bureau.

1. Before the Bureau is a motion for extension of time filed by the National Cable Television Association, Inc. ("NCTA"), requesting that the Bureau extend for 45 days, *i.e.*, from July 28, 1986, to September 11, 1986, the deadline for interested persons to file comments in the above-captioned proceeding.<sup>1</sup>

2. In support of its request, NCTA states that the extension is needed to gather cost data from its members and to prepare a research study which

<sup>1</sup> 51 FR 21774 (1986).



responds to the issues raised in the Commission's Notice of Proposed Rulemaking ("NPRM"). NCTA also asserts that such an extension of time would permit a more complete record upon which the Commission can base its decision.

3. Although good cause has been shown to grant an extension, and no evidence has been submitted that other interested parties will suffer harm from a short delay, we conclude that a 45-day extension would be excessive. Therefore, we will grant a 30-day extension of time in which to file comments and will adjust the due date for reply comments accordingly.

4. Accordingly, it is ordered, pursuant to authority delegated in § 0.291 of the Commission's Rules, 47 CFR 0.291, that the request for extension of time filed by the National Cable Television Association, Inc., is granted in part and otherwise denied.

5. It is further ordered that all interested parties may file comments on the matters discussed in the NPRM and its proposed rule changes by August 27, 1986, and reply comments by September 11, 1986.

Federal Communications Commission.  
Albert Halprin,

Chief, Common Carrier Bureau.

[FR Doc. 86-17230 Filed 7-31-86; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 86-274, RM-5246]

#### Radio Broadcasting Services; Southport, NC

##### Correction

In FR Doc. 86-15378 beginning on page 24875 in the issue of Wednesday, July 9, 1986, make the following correction:

On page 24875, third column, in the "DATES" caption, second line, insert the following after "1986": ", and reply comments on or before September 8, 1986."

BILLING CODE 1505-01-M

#### DEPARTMENT OF TRANSPORTATION

##### Federal Highway Administration

#### 49 CFR Part 391

[BMCS Docket No. MC-125; Notice No. 86-9]

#### Qualifications of Drivers; Single Classified Driver's License System

AGENCY: Federal Highway  
Administration (FHWA), DOT.

**ACTION:** Advance notice of proposed rulemaking; request for comments.

**SUMMARY:** The FHWA has determined that to improve operation of commercial motor vehicles and enhance safety on the Nation's highways, national standards for the issuance of classified commercial motor vehicle operators licenses should be established. Further, a single license requirement is needed to eliminate the possibility of drivers operating commercial motor vehicles dividing their records of accidents and violations among several State record systems and avoiding State enforcement action. This notice seeks comment on the feasibility, scope and practical implementation of a single and classified licensing system.

**DATE:** Written comments must be received on or before September 2, 1986.

**ADDRESS:** All comments should refer to the docket number that appears at the top of this document and must be submitted (preferably in triplicate) to Room 3404, Bureau of Motor Carrier Safety, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 7:45 a.m. to 4:15 p.m., ET, Monday through Friday, except legal holidays.

**FOR FURTHER INFORMATION CONTACT:**  
Mr. Neill L. Thomas, Bureau of Motor Carrier Safety, (202) 366-2999;

or

Edward J. Mullaney, Office of the Chief Counsel (202) 366-1356, FHWA, 400 Seventh Street, SW., Washington, D.C. 20590.

Office hours are from 7:45 a.m. to 4:15 p.m. ET, Monday through Friday, except legal holidays.

**SUPPLEMENTARY INFORMATION:** On October 11, 1984, Congress passed the Motor Carrier Safety Act of 1984 (Pub. L. 98-554, 98 Stat. 2829) (the Act). The Act was signed into law by the President on October 30, 1984, and requires the Secretary of Transportation (the Secretary) to issue regulations pertaining to commercial motor vehicle safety. Such regulations shall establish minimum Federal safety standards for commercial motor vehicles and shall ensure that commercial motor vehicles are safely operated.

The purposes of the Act, as stated by the Congress, are to promote the safe operation of commercial motor vehicles, to minimize dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety, and to ensure increased compliance with traffic laws and with the commercial motor vehicle safety and health rules,

regulations, standards, and orders issued pursuant to this Act.

The Congress found that it is in the public interest to enhance commercial motor vehicle safety and to reduce highway fatalities, injuries, and property damage. It is the Congress' view that, by having more uniform commercial motor vehicle measures and strengthened enforcement, the number of fatalities and injuries would be reduced and the level of property damage related to commercial motor vehicle operations would also be reduced.

Also, under 49 U.S.C. 3102, the Secretary may prescribe requirements for qualifications of employees of a motor carrier.

#### The Problem

The Congress, the Department of Transportation, the National Transportation Safety Board (NTSB), and the motor carrier industry generally have recognized there is a growing problem with the present commercial motor vehicle driver licensing system. As we see it, there are two major problems with the present system:

- (1) The licensing procedures used in the States are not uniform and may not be adequate for evaluating an applicant's qualifications to drive a large commercial motor vehicle; and
- (2) Drivers can obtain licenses easily from more than one State and thereby avoid possible license suspensions by spreading out their violations among the various licenses.

Several different proposals for some form of a "National Drivers License" have been made by industry associations, public interest groups and the Congress. While these proposals may differ regarding such things as the types of commercial motor vehicle drivers that should be covered and the issuing authority for such licenses, there is commonality concerning the five items that need to be addressed:

- (1) Lack of uniform/sufficient State licensing system;
- (2) Single licensing requirements;
- (3) Knowledge and skill examination standards;
- (4) Positive driver identification methods; and
- (5) A record system clearinghouse.

#### Discussion

##### 1. Lack of a Uniform/Sufficient State Licensing System

The NTSB recently stated "truck driving is a specialized skill, distinct in many ways, and more demanding than operating a smaller vehicle, such as a car. However, far too many people are



able to enter the field without having first acquired that skill" (NTSB Safety Recommendation H-86-8 and 9).<sup>(1)</sup> This ability to enter the field without adequate testing is a result of a variety of factors, but is primarily caused by the lack of a uniform classified driver licensing system (CLS) which incorporates standardized requirements, testing procedures and criteria for the license suspension/revocation of problem drivers.

Presently, only 31 States utilize some form of a CLS and the systems employed vary from State to State. Only 12 of these States require behind-the-wheel road testing (in trucks or buses) of all applicants, while the other 19 will waive testing if the applicant meets certain conditions such as completion of a training program at an accredited training school. Even in the 12 testing States, the tests are not uniform and in many cases may not be adequate to screen out drivers who may lack the necessary skills to safely operate heavy vehicles on our Nation's roadways. The remaining number of States and the District of Columbia do not require applicants to demonstrate proficiency in the type of vehicle intended to be operated. This enables a driver, qualified to drive a subcompact car, to drive a three axle inter-city bus or a tractor-trailer combination throughout the country without ever demonstrating proficiency in operating that specific type of vehicle.

## 2. Single Licensing Requirement

It is well known that many drivers of commercial motor vehicles obtain driver's licenses from several States so that they do not accumulate an excessive number of traffic convictions on a single license. By holding several licenses, the driver can spread out traffic violations among those licenses, keeping one relatively clear of violations. During the period 1972 through 1979, the NTSB conducted 44 accident investigations which involved commercial motor vehicles. While investigating these accidents, NTSB made inquiries relative to the 44 commercial vehicle drivers' driving records. The NTSB reported "When the responses to these inquiries were compiled, the composite records of the 44 drivers listed a total of 63 driver licenses, 98 license suspensions, 60 previous accidents, and 456 traffic convictions."<sup>(2)</sup> The most common traffic conviction (more than 60 percent of the total convictions) was for speeding.

The ability to obtain more than one license is fostered by the lack of an active exchange of information between

all license issuing authorities concerning driver records. Since it is difficult to detect when a driver is holding multiple drivers' licenses, this results in drivers being able to escape detection and suspension or revocation. It also precludes law enforcement agencies and motor carrier employers from accurately evaluating an individual's complete driving record. A study by the National Highway Traffic Safety Administration (NHTSA) in cooperation with the American Association of Motor Vehicle Administrators (AAMVA) entitled "Multiple Licensing and Interstate Truck Drivers" reached a similar conclusion.<sup>(3)</sup> This is contrary to "the one license/one record concept," which is designed so that driver licenses issued by the States do not constitute separate privileges to drive; rather, each individual has a single, nationwide driving privilege which may be certified by any State through the issuance of a driver license and a single record which details each driver's history.

In a 1983 review of the transportation of hazardous materials by highway, the NTSB compiled the results of their investigations of 15 accidents which had occurred since 1972, involving trucks transporting hazardous materials in bulk, where truck driver error or deficiency was a causal factor.<sup>(4)</sup> These accidents involved vehicle overturns, jackknives, and collisions with trains, and collectively resulted in 61 fatalities and 283 injuries. Most of the fatalities and injuries were caused by the release of the hazardous materials being transported. Although records were not available for all of the involved drivers, a review of the records located by the NTSB disclosed 11 driver's license suspensions, 19 previous accidents, and 83 previous traffic convictions among these 15 drivers.

The FHWA believes that restricting commercial motor vehicle drivers to single driver's license is essential to the detection and control of problem drivers. Further, we believe that the motivation for a driver obtaining multiple driver's licenses is in most cases to escape detection as a "problem driver" by motor carrier employers, law enforcement agencies, and licensing agencies.

## Current Approaches and Technologies

### 1. Knowledge and Skill Testing Development

The National Highway Traffic Safety Administration conducted a research study to develop a set of tests and procedures that States could use to evaluate entry level knowledge and skill of heavy vehicle license applicants.<sup>(5)</sup>

The components of the study, known as Truck Operator Qualifications Examination (TORQUE), consists of the following:

*Operator Manual*—presents safe operating procedures related to controlling the vehicle, operating on the road, responding to emergencies, and handling accidents. Driver fitness and vehicle readiness characteristics are also addressed.

*Knowledge Test*—is a pool of 96 multiple choice test items designed to sample critical knowledge of necessary practices to safely drive a large commercial motor vehicle.

*Operator Pre-Trip Test Manual*—presents the exercises, examination procedures and scoring criteria for a vehicle inspection, and for coupling and uncoupling a tractor-trailer combination.

*Operator Skill Test Manual*—contains information and procedures for administering a test of an applicant's skills in handling a large vehicle in an off-street environment.

*Operator Road Test Manual*—presents information procedures for administering a reliable test of safe driving skills in traffic. The 30-minute test samples 100-150 critical performance measures on a standard test route. Performance is tested under specific situations and at designated locations. Performance checks include braking, shifting, turning, lane keeping, visual search, signaling, speed selection and space management.

TORQUE represents one contractor's approach to this issue. The FHWA believes that, with the help of States, motor carriers and drivers, workable uniform tests can be developed. A copy of the study has been placed in the docket.

### 2. Driver Identification Methods

In order to make a single license system work, it is essential that there be a system for uniquely identifying each license holder. Without such an identifier, drivers would be able to circumvent the system, leaving potential problem drivers still operating.

Most States identify a driver by name, address and other physical characteristics, and possibly social security number. Computer technology has also fostered the growth of biometrics that measure a physical attribute of an individual. The capability to accurately measure physical attributes of an individual for uniqueness is a relatively new, but rapidly developing technology. Significant advances have been announced in the areas of signature analysis, retinal imaging, voice prints,



ear prints, and fingerprints. The digitalization of fingerprints appears to have the highest validity for accurately reproducing the same numeric representation of an individual's print over time.

The National Driver Register uses a sophisticated name search program plus date of birth to identify individuals. The use of this concept will provide exact match identification if the applicant is specifically truthful or if data input to the system is 100 percent verified. In cases of fraudulent applications this method without other data cannot provide exact matches, and therefore requires human analysis for positive identification. By definition, this human analysis must be performed by issuing office personnel.

An alternative to identifying a simple physical characteristic of an individual is the use of the "smart card." This card has the capability of containing the full record of the driver's characteristics including a digital representation of the driver's photograph.

The FHWA believes that an identifier or group of identifiers is needed but, as raised in the attached questions, the issues are how unique the identifier must be, whether the system is appropriate, and if it can be cost effective. In addition, what types of systems are feasible?

### 3. Record Systems

**Clearinghouse.** The clearinghouse concept assumes that to successfully manage the one license-one individual objective a means must exist to compile all relevant traffic violations. The FHWA raises questions below regarding how and whether the clearinghouse concept can be implemented either at the Federal level or in the private sector on a profit or non-profit basis.

One alternative to the clearinghouse concept is to provide a telecommunication network to all license issuing jurisdictions in order to "poll" all jurisdictions to determine prior registration for a commercial driver. This assumes that each commercial license applicant can be uniquely identified in a standard manner to all jurisdictions. Networks exist at the present time or are planned in the future to provide the communication capability between State jurisdictions on a selected basis as follows:

**A. National Law Enforcement Telecommunication Systems (NLETS):** this system provides law enforcement jurisdictions the capability to obtain information from other law enforcement jurisdictions. NLETS is managed by member jurisdictions. Intrastate communication is the responsibility of

each State. The NLETS is a sophisticated, high-speed and high-capacity switching network that routes requests for information and dissemination of information among the jurisdictions participating in the system. The current users have a unique address to facilitate routing of data.

**B. Alliance for a Motor Vehicle Administrator's Telecommunication Network (AMVAT):** A feature of this proposed system is a capability to broadcast a simultaneous search of participating State data bases. The full range of requirements and planned capabilities of this system are unknown at this time.

**C. National Driver Register Problem Driver Pointer System Network (NDR/PDPS):** The full network will be operational in the early 1990's after the successful test of the Problem Driver Pointer System, and appropriate authority from Congress. This network will provide a full interactive link between all State licensing jurisdictions and the National Driver Register.

**D. D.A.C. Services** provides a program to verify driver records. This is a four-part system which supplies a nationwide (except Massachusetts) motor vehicle record (MVR), an MVR pointer file designed to address the multiple license problems, a national claims file to address falsification or omission of employment or insurance applications, and an employment history file.

### Proposal

The FHWA is enlisting the aid of the various States, industry, labor, and the public to develop comprehensive driver licensing standards that will encompass a uniform standardized approach to the issuance of a single classified commercial motor vehicle (truck and bus) driver's license. Development and adoption by the States of practical, uniform CLS's will improve the quality of commercial motor vehicle drivers and, ultimately, will result in safety benefits to the motoring public, motor carriers (employers) and the drivers themselves. In order to develop practicable standards for a performance-oriented single and classified licensing system which would be initiated and administered by the various States, interested persons are invited to submit substantive written data and documentation, views, or arguments concerning any aspect of this rulemaking action. If a commenter wishes to comment on a single question or a group of questions, these responses will be welcome. The following questions are grouped in general areas of concern in order to aid commenters.

### General Questions

#### Scope of the Problem

1. By statute the Federal Motor Carrier Safety Regulations apply to operations in interstate commerce. Should the driver licensing requirements apply to only those drivers who drive in interstate operations? Will there be cost efficiencies and safety benefits that would dictate State decisions to implement one system for all drivers?

2. Under current State licensing systems, exemptions are provided for specific types of operations. Should the proposed licensing system apply to all drivers without any exemptions or should exemptions be provided for specific operations such as, farm operations, the personal transportation of household goods, single trip operations in rental trucks, school buses, logging operations and motor homes?

3. In the Motor Carrier Safety Act of 1984, "commercial motor vehicle" is defined as a motor vehicle having a gross vehicle weight rating of 10,001 pounds or more; the motor vehicle is transporting hazardous materials requiring the vehicle to be placarded or is designed to transport 15 passengers or more. Should the same parameters be used to define "commercial motor vehicle driver" in this proposed nationwide licensing system or should other parameters be used to identify drivers in the system? Should the weight limit be increased? If so, to what weight and why? How would this effect the need for exemptions?

4. At the present time drivers from contiguous foreign countries are allowed into the United States provided the driver has a valid license from that country. Under a national licensing system with uniform testing and licensing, how should commercial motor vehicle drivers from these foreign countries be licensed to drive into or through the United States?

#### Timing and Implementation

5. How can State participation be most effectively ensured? If a State does not choose to participate, what accommodations can be made for drivers residing in a nonparticipating State?

6. What is the best way to finance a nationwide licensing system that is administered by the States? Currently the user States finance such systems and generally the licensing fee is quite low. How much would fees need to be increased to cover the cost of a new system? Are there other methods available to the States?



7. The implementation of a licensing program for commercial vehicle drivers could be an initial burden on a State that currently does not provide for necessary testing. What lead time is necessary for a State to hire the required personnel, train examiners, provide testing material, find testing locations and all of the other administrative support activities for a licensing program to become operational? Could the time be accommodated through a phase-in period or a staged implementation? That is, could the first drivers in the system be the drivers of heavy tractor-trailer combinations followed by drivers of lighter weight vehicles? Could all current drivers with clean driving records be grandfathered? Should they be grandfathered until they have to renew their licenses?

8. For States that now have an operative system of licensing commercial vehicle drivers, including both written and skill testing, what length of time would be necessary to convert their present system to a standardized national system?

9. Should all States follow the same implementation schedule? Should the new system be implemented a few States at a time? Are there some States that have classified licensing systems that have been tested and could serve as a model for a nationwide system?

#### Single Licensing Questions

##### *Record Systems*

10. For the success of a national system of commercial motor vehicle driver licensing, it is necessary to ensure that the affected drivers hold only one valid license and that the system be enforceable. Who should maintain the driving record for each driver? What information is necessary for the license record? What provisions are necessary to ensure enforceability? What should the State and Federal roles be in the enforcement system?

11. Are there additional alternatives to that of a clearinghouse central data base or a communication network that simultaneously searches all State jurisdiction files to control and enforce the issuance of one license per individual commercial driver?

12. What information should be maintained and exchanged between State jurisdictions on commercial drivers (e.g., personal identification characteristics; motor vehicle violation records; accident reports)?

13. Do existing or proposed State telecommunication systems (NLETS, AMVAT, NDR/PDPS) have the capability to adequately serve as the

commercial motor vehicle driver network for interchange of data?

14. What procedures should be used to ensure that drivers hold only a single license? Under the current regulations, employers are responsible for monitoring the driving records of their employees. Should the data and reporting requirements for employers be changed to include the driver license number (i.e., on medical certificates, personnel papers, etc.) to help enforce the single license requirement? Could the use of a temporary license be used to provide the necessary safeguards and time to ensure the driver has only one license? What are the costs associated with these procedures?

15. Currently the States use the National Law Enforcement Telecommunications System (NLETS) to forward controlled messages between State law enforcement agencies, and between local and Federal enforcement agencies. At the present time about 35 percent of the traffic on NLETS is driver license inquiries and responses. Is NLETS a system that could be used for all States to exchange information regarding commercial vehicle drivers licenses, as well as the checking of a drivers license by the State enforcement agency?

16. D.A.C., Inc., a private operation, is one of the Nation's largest supplier of driving records to the insurance industry and the single largest suppliers of driving records by computer to the motor carrier industry. In addition to motor vehicle records, D.A.C. receives information from previous employers and insurance companies. All information is accessible by the driver's name and social security number. Could a private operation, such as D.A.C., handle the necessary exchange of information involving the licensing of commercial drivers? How would this be funded?

17. In record and data exchange, what is the most practical role for the States, for the Federal Government, and for the industry in the day-to-day operation of the commercial driver licensing system? Please explain your rationale.

18. Who should have access to the data maintained on commercial motor vehicle drivers? What privacy constraints should be formulated to protect the rights of the private citizen?

19. Who should fund the establishment of the commercial driver information system and how much would this system cost? What are the costs and benefits?

##### *Driver Identification*

20. Are existing identification techniques such as use of the social

security number adequate for enforcement of "one license-one record" concept? Are there privacy problems with this approach? What is your opinion on the use of high technology techniques, such as digitalized fingerprints to identify individuals for commercial licenses?

21. Should the Federal Motor Carrier Safety Regulations be amended to require the license number on all documents pertaining to the driver, such as the Medical Certificate and the Driver's Record of Duty Status (Driver's Log); and what effect might this have on reducing driver violations?

22. Currently eight States require a nonresident driver seeking to obtain employment in that State to obtain a license. This results in the driver holding two or more licenses. Should such practices continue? If so, what other options are available to States to ensure that these drivers who are required to hold two licenses do not defeat the single license concept by allowing convictions to be spread among the two States? Even if this is pursued, should there only be one record?

#### Uniform Standards Questions

##### *Classification*

23. How specific should Federal standards be? Should they establish detailed standards that would not require States to make (design standard) judgments or should they serve as general standards which would allow States to develop the specific criteria (performance standards)?

24. How many classifications should such a licensing system have? Should the classes be based upon vehicle size, weight, number of axles, number of wheels, number of articulation points (such as doubles and triples), cargo and/or commodity, such as, liquids and hazardous materials, or upon vehicle configurations?

##### *Driver Qualifications*

25. Licensing tests are administered to assure that applicants who apply for a license are qualified to operate their vehicles safely. A license test, to have maximum value as an accident countermeasure, must assess a broad range of characteristics which underlie safe and efficient operating behavior. Therefore the broad question is: What are the requirements of an operator test that would contribute to a reduction of accidents and injuries involving commercial motor vehicles?

26. Would any test be reliable in measuring the requirements for safe driving? Do tests such as those



developed as part of the Truck Operator Qualifications Examination (TORQUE) adequately measure the knowledge and skill of truck and bus applicants? Who should develop the knowledge and skill tests?

27. Should operator tests cover knowledge, pre-trip inspection, close quarter maneuvering skills and high-speed traffic? If not, what areas should be covered?

28. What procedures would be effective and least costly in providing training to potential operators as preparation for taking the tests? What are the associated costs?

#### *Suspension/Revocation*

29. Who should develop the criteria for suspension and/or revocation of the license or driving privileges? What should the criteria be? What should be considered as effective enforcement mechanisms?

30. Should these commercial motor vehicle drivers' licenses be issued and/or renewed based upon the driver's submission of evidence of physical fitness, in the form of Medical Certificates, as presently required in the Federal Motor Carrier Safety Regulations, and if so, should they be the same or made either more or less stringent?

31. Should these proposed licenses be automatically renewed as long as the holder maintains a clean driving record, or should all drivers be reexamined on a periodic basis? If they are to be reexamined, at what time intervals?

Should the time intervals be shortened for new drivers? For older drivers?

#### *Costs*

32. What are the probable costs to implement a qualification standard? Is it appropriate to finance it through license fees and other user fees? What level of fee would be considered reasonable for the drivers license, and what fee would be reasonable for those who query the system, through the States, for driver license record information?

The FHWA has determined that this document is not a major rule under Executive Order 12291. However, it is considered a significant regulation under the regulatory policies and procedures of the Department of Transportation because of the public interest involved. A draft regulatory evaluation has been prepared and is available for inspection and copying in the public docket by contacting Mr. Neill L. Thomas at the address provided under the heading **"FOR FURTHER INFORMATION CONTACT."**

Base on the information available at this time, it is believed that any action taken in this rulemaking will not have a significant economic impact on a substantial number of small entities.

#### *List of Subjects in 49 CFR Part 391*

Highways and roads, Highway safety, Motor carriers, Motor vehicle safety, Driver qualifications.

(Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety).

(49 U.S.C. App. 2505 and 49 U.S.C. 3102; 49 CFR 1.43 and 301.60)

Issued on: July 29, 1986.

**Kenneth L. Pierson,**

*Director, Bureau of Motor Carrier Safety,  
Federal Highway Administration.*

#### *Footnotes*

(1.) Available for inspection and copying from the BMCS files or by contacting the NTSB, Public Inquiries, Room 805F, 800 Independence Avenue, SW., Washington, D.C. 20594, (202) 382-6600.

(2.) NTSB, Office of Evaluations and Safety Objectives, Safety Effectiveness Evaluation of Detection and Control of Unsafe Interstate Commercial Drivers Through the National Driver Register, State Driver Licensing Policies and the Federal Motor Carrier Safety Regulations, Report No. NTSBSEE801, February 15, 1980, p. 18.

(3.) NHTSA in cooperation with American Association of Motor Vehicle Administrators, Multiple Licensing and Interstate Truck Drivers—A Problem Statement, DOT-HS-805-645, January 1981.

(4.) NTSB, Recommendations H-83-30 through 34, July 8, 1983. Available for inspection and copying from the BMCS Docket Files or by contacting the NTSB, Public Inquiries, Room 805F, 800 Independence Avenue SW., Washington, D.C. 20594, (202) 382-6600.

(5.) Development of Knowledge and Performance Tests for Heavy Vehicle Operators, Volume I: Development and Field Test; Volume II: License Administrator/Examiner Manuals; Contract No. DTNH22-80-C-07336. The documents are available from the National Technical Information Service, Springfield, Virginia 22161.

[FR Doc. 86-17394 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-22-M



# Notices

Federal Register

Vol. 51, No. 148

Friday, August 1, 1986

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Federal Grain Inspection Service

#### Designation Renewal of the Fremont (NB) and Titus (IN) Agencies

**AGENCY:** Federal Grain Inspection Service (FGIS), USDA.

**ACTION:** Notice.

**SUMMARY:** This notice announces the designation renewal of Fremont Grain Inspection Department, Inc. (Fremont) and Titus Grain Inspection, Inc. (Titus), as official agencies responsible for providing official services under the U.S. Grain Standards Act, as Amended (Act).

**EFFECTIVE DATE:** September 1, 1986.

**ADDRESS:** James R. Conrad, Chief, Review Branch, Compliance Division, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 1647 South Building, Washington, DC 20250.

**FOR FURTHER INFORMATION CONTACT:** James R. Conrad, telephone (202) 447-8525.

**SUPPLEMENTARY INFORMATION:** This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512-1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

FGIS announced that Fremont's and Titus's designations terminate on August 31, 1986, and requested applications for official agency designation to provide official services within specified geographic areas in the March 3, 1986, *Federal Register* (51 FR 7301). Applications were to be postmarked by April 2, 1986. Fremont and Titus were the only applicants for their respective designations and each applied for designation renewal in the area currently assigned to that agency.

FGIS announced the applicant names and requested comments on the same in the May 1, 1986, *Federal Register* (51 FR 16182). Comments were to be postmarked by June 18, 1986. No comments were received regarding Fremont's and Titus's designation renewal.

FGIS evaluated all available information regarding the designation criteria in section 7(f)(1)(A) of the Act, and in accordance with section 7(f)(1)(B), determined that Fremont and Titus are able to provide official services in the geographic area for which FGIS is renewing their designation. Effective September 1, 1986, and terminating August 31, 1989, Fremont and Titus will provide official inspection services in their specified geographic area, which is the entire area previously described in the March 3 *Federal Register*.

A specified service point, for the purpose of this notice, is a city, town, or other location specified by an agency for the performance of official inspection or Class X or Class Y weighing services and where the agency and one or more of its inspectors or weighers is located. In addition to the specified service points within the assigned geographic area, an agency will provide official services not requiring an inspector or weigher to all locations within its geographic area.

Interested persons may contact the Review Branch, specified in the address section of this notice, to obtain a list of an agency's specified service points. Interested persons also may obtain a list of the specified service points by contacting the agencies at the following addresses:

Fremont Grain Inspection Department, Inc., 603 East Dodge Street, Fremont, NE 68025

Titus Grain Inspection, Inc., 1111 East 800 North, West Lafayette, IN 47906

Authority: Pub. L. 94-582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: July 18, 1986.

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 86-17328 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-EN-M

#### Request for Comments on Designation Applicants in the Geographic Area Currently Assigned to the Amarillo Agency (TX) and State of Wisconsin (WI)

**AGENCY:** Federal Grain Inspection Service (FGIS), USDA.

**ACTION:** Notice.

**SUMMARY:** This notice requests comments from interested parties on the applicants for official agency designation in the geographic area currently assigned to Amarillo Grain Exchange, Inc. (Amarillo) and Wisconsin Department of Agriculture, Trade and Consumer Protection (Wisconsin).

**DATE:** Comments to be postmarked on or before September 15, 1986.

**ADDRESS:** Comments must be submitted, in writing, to Lewis Lebakken, Jr., Information Resources Staff, Resources Management Division, Federal Grain Inspection Service, U.S. Department of Agriculture, Room 1661 South Building, 1400 Independence Avenue, SW., Washington, DC 20250. All comments received will be made available for public inspection at the above address during regular business hours (7 CFR 1.27(b)).

**FOR FURTHER INFORMATION CONTACT:** Lewis Lebakken, Jr., telephone (202) 382-1738.

**SUPPLEMENTARY INFORMATION:** This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512-1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

FGIS requested applications for official agency designation to provide official services within specified geographic areas in the June 2, 1986, *Federal Register* (51 FR 19769). Applications were to be postmarked by July 2, 1986. Amarillo and Wisconsin were the only applicants for their respective designations and each applied for designation renewal in the area currently assigned to that agency.

This notice provides interested persons the opportunity to present their comments concerning the designation applicants. All comments must be submitted to the Information Resources Staff, Resources Management Division,



specified in the address section of this notice.

Comments and other available information will be considered in making a final decision. Notice of the final decision will be published in the Federal Register, and the applicants will be informed of the decision in writing.

Authority: Pub. L. 94-582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: July 18, 1986.

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 86-17329 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-EN-M

#### Request for Designation Applicants To Provide Official Services in the Geographic Area Currently Assigned to the Farwell Agency (TX)

**AGENCY:** Federal Grain Inspection Service (FGIS).

**ACTION:** Notice.

**SUMMARY:** Pursuant to the provisions of the U.S. Grain Standards Act, as Amended (Act), official agency designations shall terminate not later than triennially and may be renewed according to the criteria and procedures prescribed in the Act. This notice announces that the designation of one agency will terminate, in accordance with the Act, and requests applications from parties, including the agency currently designated, interested in being designated as the official agency to provide official services in the geographic area currently assigned to the specified agency. The official agency is Farwell Grain Inspection Company.

**DATE:** Applications to be postmarked on or before September 2, 1986.

**ADDRESS:** Applications must be submitted to James R. Conrad, Chief, Review Branch, Compliance Division, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 1647 South Building, Washington, DC 20250. All applications received will be made available for public inspection at the above address during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** James R. Conrad, telephone (202) 447-8525.

**SUPPLEMENTARY INFORMATION:** This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12291 and Departmental Regulation 1512-1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act specifies that the Administrator of FGIS is authorized, upon application by any qualified agency or person, to designate such agency or person to provide official services after a determination is made that the applicant is better able than any other applicant to provide official services in an assigned geographic area.

Farwell Grain Inspection Company (Farwell), 112 9th Street, P.O. Box 488, Farwell, TX 79325, was designated under the Act as an official agency to provide inspection functions on February 1, 1984.

The official agency's designation terminates on January 31, 1987. Section 7(g)(1) of the Act states that official agencies' designations shall terminate not later than triennially and may be renewed according to the criteria and procedures prescribed in the Act.

The geographic area presently assigned to Farwell, in the States of Texas and New Mexico, pursuant to section 7(f)(2) of the Act, which may be assigned to the applicant selected for designation, is as follows: Bailey, Deaf Smith (west of State Route 214), Lamb (south of U.S. Route 70 and west of FM 303), and Parmer Counties, Texas. Bernalillo, Chaves, Curry, DeBaca, Eddy, Guadalupe, Lea, Quay, Roosevelt, San Miguel, Santa Fe, Torrance, and Union Counties, New Mexico.

Interested parties, including Farwell, are hereby given opportunity to apply for official agency designation to provide the official services in each geographic area, as specified above, under the provisions of section 7(f) of the Act and § 800.196(d) of the regulations issued thereunder. Designation in the specified geographic area is for the period beginning February 1, 1987, and ending January 31, 1990. Parties wishing to apply for designation should contact the Review Branch, Compliance Division, at the address listed above for forms and information.

Applications and other available information will be considered in determining which applicant will be designated to provide official services in a geographic area.

Authority: Pub. L. 94-582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: July 18, 1986.

J.T. Abshier,

Director, Compliance Division.

[FR Doc. 86-17330 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-EN-M

#### Soybean Damage Interpretation

**AGENCY:** Federal Grain Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** Damaged soybeans are determined by reference to interpretive line slides (ILS). FGIS is revising certain slides to tighten damage interpretations for grading soybeans to more adequately reflect the implications of damaged soybeans to the domestic and foreign soybean crushing industry.

**DATE:** The revised interpretive line slides for grading soybeans will be effective September 1, 1986.

**FOR FURTHER INFORMATION CONTACT:** Lewis Lebakken, Jr., Information Resources Staff, USDA, FGIS, Room 1661 Suth Building, 1400 Independence Avenue SW., Washington, DC 20250, telephone (202) 382-1738.

**SUPPLEMENTARY INFORMATION:** Notice of a public meeting to discuss the tightening of interpretations of soybean damage was published in the Federal Register on June 24, 1986 (51 FR 22959). The meeting held on July 10, 1986, in St. Louis, Missouri, was attended by 25 persons representing exporters, domestic soybean processors, official inspection agencies, a university Plant Pathologist, and producers.

The agenda included: (1) Definition of the problem, (2) presentation of the current interpretations, (3) review of proposed interpretations, and (4) discussion of data on chemical analysis of samples graded under the current and proposed interpretations.

Information presented at the meeting included foreign buyer concerns, the need for tightening the interpretations of damage in soybeans as reflected in the ILSs, and the results of FGIS research regarding such damage which supported the need for revising the ILSs.

Damaged soybeans are determined by reference to a set of interpretive line slides (ILS). The ILSs are 35mm color transparencies. The specific ILSs revised are: (SB-1.0) Badly Ground or Weather Damaged, (SB-3.0) Frost Damaged, (SB-6.0) Mold Damaged, (SB-2.0) Damaged by Heat, and (SB-5.0) Heat Damaged.

Increased damage to soybeans caused by weather and harvest conditions during the last two crop years (1984-85 and 1985-86) raised concerns about the appropriate interpretations of damage in soybeans. A primary consideration of these concerns was the percent of free fatty acids (FFA) found in the crude processed soybean oil. Damage diminishes quality because of increased FFA levels which reflect oil deterioration. Elevated levels of FFA result in a refining loss and in increased costs associated with removal of FFA. In



addition, several foreign complaints specifically mentioning increased FFA in soybean oil processed from U.S. export shipments were received by FGIS in 1985 and 1986. Also, concern was expressed as to the overall appearance of the soybeans received.

The Grain Quality Workshops sponsored by the North American Export Grain Association recently issued a final report entitled "Commitment to Quality." The report discussed the effects of soybean damage on FFA values in soybean oil. The report recommended that FGIS change the ILSs for soybean damage to reflect interpretations presently used by the domestic and foreign crushing industry. This would require changing the ILSs to correspond with the National Soybean Processing Association and the Federation of Oils, Seeds, and Fats Association trading rule of 0.75% maximum FFA for crude degummed soybean oil as a benchmark to interpret the damage factors for U.S. No. 2 yellow soybeans.

FGIS has conducted research on the effects of the current and revised interpretations of damage on the levels of FFA in soybean oil. These studies have indicated that the current soybean damage interpretation would give a predicted FFA in oil of approximately 1.0% in a U.S. No. 2 grade containing 3.0% damage. Under the revised damage interpretation a predicted FFA in oil would be approximately 0.7% in a U.S. No. 2 grade containing 3.0% damage. Standard deviation for these predicted FFA values was approximately 0.2%. Accordingly, the revised ILSs would approximate the trading rule level for FFA in U.S. No. 2 yellow soybeans.

The changes in the ILSs and associated changes in FFA levels for U.S. No. 2 yellow soybeans were endorsed by representatives of the American Soybean Association. Producers expressed satisfaction with the changes. However, exporters present at the meeting were of the opinion that further study was needed. FGIS has determined that based upon all information available including its own research, the ILSs need to be revised. Inspection personnel, university researchers, and domestic soybean processors concurred with the changes except for the mold interpretive line slide. Data were presented by a university Plant Pathologist showing that "powdery mildew" mold is superficial and, while a form of damage, is of less concern than other molds. Based on this information FGIS will issue an ILS showing invaded (those molds that penetrate the surface of the

seed coat) and surface or superficial molds.

Concern was expressed by several representatives about the need for training and implementation prior to the harvest this fall. The effective date of September 1 will allow ample time for adequate training of official inspection personnel.

Based upon all information available, FGIS is revising the soybean damage ILSs by tightening the soybean damage interpretations for badly ground or weather damaged, frost damaged, mold damaged, damaged by heat and heat damaged.

Dated: July 29, 1986.

Kenneth A. Gilles,  
Administrator.

[FR Doc. 86-17383 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-EN-M

## DEPARTMENT OF COMMERCE

### Agency Forms Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposals for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of the Census  
Title: 1987 Economic Censuses-Listing of Additional Establishments  
Form number: Agency—NC-9920;  
OMB—NA

Type of request: New collection  
Burden: 65,000 respondents; 32,500 reporting hours

Needs and uses: The objective of the Listing of Additional Establishments is to obtain name and address information for establishments for which a separate 1987 Economic Censuses report form was not received or which were not listed on the 1987 Economic Censuses Report of Organization. This census will be conducted in FY88.

Affected public: Farms, businesses or other for-profit institutions, non-profit institutions, small businesses or organizations

Frequency: Quinquennially  
Respondent's obligation: Mandatory  
OMB desk officer: Timothy Sprehe 395-4814

Agency: Bureau of the Census  
Title: 1987 Economic Censuses-Report of Organization

Form number: Agency—NC-9901;  
OMB—NA

Type of request: New collection  
Burden: 65,000 respondents; 48,750 reporting hours

Needs and uses: The objective of the Report of Organization is the continuing updating and maintenance of the Standard Statistical Establishment List. This census will be conducted in FY88.

Affected public: Farms, businesses or other for-profit institutions, non-profit institutions, small businesses or organizations

Frequency: Quinquennially  
Respondent's obligation: Mandatory  
OMB desk officer: Timothy Sprehe 395-4814

Agency: Bureau of the Census  
Title: 1987 Census of Agriculture  
Form number: Agency—87-A0101, 87-A0201, 87-A0301, etc.; OMB—NA  
Type of request: New collection  
Burden: 4,000,000 respondents; 1,540,000 reporting hours

Needs and uses: This census is the only source of agriculture data comparable and consistent at national, state, and county levels. It provides data for the agriculture economy for benchmarking more frequent sample surveys, evaluating government farm policies and programs, and assessing American agriculture. This survey will be conducted in FY88.

Affected public: Farms  
Frequency: Quinquennially  
Respondent's obligation: Mandatory  
OMB desk officer: Timothy Sprehe 395-4814

Copies of the above information collection proposals can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-4217, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collections should be sent to Timothy Sprehe, OMB Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

Dated: July 28, 1986.

Edward Michals,  
Departmental Clearance Officer, Information Management Division.

[FR Doc. 86-17377 Filed 7-31-86; 8:45 am]

BILLING CODE 3510-07-M

## International Trade Administration

### Short Supply Review on Certain Carbon Steel Cold Rolled Strip; Request For Comments

AGENCY: International Trade Administration/Import Administration, Commerce.



**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of Commerce hereby announces its review of a request for a short supply determination under Article 8 of the U.S.-EC Arrangement on Certain Steel Products with respect to certain cold rolled carbon steel strip for use in manufacturing knitting machine components.

**EFFECTIVE DATE:** Comments must be submitted no later than August 11, 1986.

**ADDRESS:** Send all comments to Nicholas C. Tolerico, Acting Director, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, 14th and Constitution Ave., NW., Washington, DC 20230, Room 3099.

**FOR FURTHER INFORMATION CONTACT:** Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, 14th and Constitution Ave., NW., Washington, DC 20230, Room 3099, (202) 377-0159.

**SUPPLEMENTARY INFORMATION:** Article 8 of the U.S.-EC Arrangement on Certain Steel Products provides that if the U.S. . . . determines that because of abnormal supply or demand factors, the U.S. steel industry will be unable to meet demand in the USA for a particular product (including substantial objective evidence such as allocation, extended delivery periods, or other relevant factors), an additional tonnage shall be allowed for such product. . . .

We have received a short supply request for certain cold rolled carbon steel strip, grade 1095, in widths ranging from 1 to 2 1/2 inches and thicknesses ranging from .004 to .027 inch, to be used in manufacturing certain knitting machine components.

Any party interested in commenting on this request should send written comments as soon as possible, and no later than ten days from publication of this notice. Comments should focus on the economic factors involved in granting or denying this request.

Commerce will maintain this request and all comments in a public file. Anyone submitting business proprietary information should clearly identify that portion of their submission and also provide a non-proprietary submission which can be placed in the public file. The public file will be maintained in the Central Records Unit, Import Administration, U.S. Department of

Commerce, Room B-099 at the above address.

Gilbert B. Kaplan,  
Deputy Assistant Secretary for Import  
Administration.

July 28, 1986.

[FR Doc. 86-17379 Filed 7-31-86; 8:45 am]

BILLING CODE 3510-DS

#### National Aeronautics and Space Administration; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 1523, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 86-180. Applicant: National Aeronautics and Space Administration, Greenbelt, MD 20771. Instrument: Magnetic Tape Abrasivity Test Monitor. Manufacturer: Fulmer Research Laboratory Ltd., United Kingdom. Intended use: See notice at 51 FR 15821.

Comments: None received. Decision: Denied, Reasons: The article and its intended use possess no scientific value upon which to base a finding of scientific equivalency. Item 851.60 of the Tariff Schedules of the United States (TSUS) provides, *inter alia*, for duty-free treatment of "Articles entered for the use of any nonprofit institution, whether public or private, established for educational or scientific purposes . . . if no instrument or apparatus of equivalent scientific value for the purposes for which the instrument or apparatus is intended to be used is being manufactured in the United States" (emphasis supplied). The law requires use to determine "Whether an instrument or apparatus of equivalent scientific value to such [the foreign] article, for the purposes for which the instrument or apparatus is intended to be used, is being manufactured in the United States" (Headnote 6(c), Schedule 8, Part 4, TSUS). In order to make the determination of scientific equivalency, it is clear that some scientific use for the foreign article, whether in education or research, must be intended.

Although the applicant is an eligible educational institution and the foreign article falls within the tariff items eligible for duty-free entry consideration, the intended use of the instrument on the NASA Space Tracking Data Network is not scientific. Testing

and monitoring the abrasivity of magnetic tapes for conformance to quality assurance requirements is not scientific research within the intent of Pub. L. 89-651.

Accordingly, we cannot ascribe a scientific value to the article for the purposes for which it is to be used and, consequently, cannot make the scientific equivalency finding upon which duty-free entry must be conditioned. Therefore, pursuant to § 301.5(d)(1)(iii) of the regulations, we deny the application.

(Catalog of Federal Domestic Assistance Program No. 11.105, Importation of Duty-Free Educational and Scientific Materials)

Leonard E. Mallas,

Acting Director, Statutory Import Programs Staff.

[FR Doc. 86-17378 Filed 7-31-86; 8:45 am]

BILLING CODE 3510-DS-M

#### National Oceanic and Atmospheric Administration

##### Caribbean Fishery Management Council; Public Meeting

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

The Caribbean Fishery Management Council's Administrative Subcommittee will convene a public meeting, August 13, 1986, from 9:30 a.m. to approximately 4 p.m. at the Council's office (address below), to discuss issues related to the Committee's regular administrative operators.

For further information contact the Caribbean Fishery Management Council, Banco de Ponce Building, Suite 1108, Hato Rey, Puerto Rico 00918; telephone: (809) 753-4926.

Dated: July 28, 1986.

Richard B. Roe, Director,  
Office of Fisheries Management, National  
Marine Fisheries Service.

[FR Doc. 86-17343 Filed 7-31-86; 8:45 am]

BILLING CODE 3510-22-M

##### Mid-Atlantic Fishery Management Council; Public Meeting

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

The Mid-Atlantic Fishery Management Council will convene a public meeting, August 20-21, 1986, at Ramada Inn, 76 Industrial Highway, Essington, PA (phone: 215-521-9600), to discuss the Blue Ribbon Panel Report; the Fishery Management Primer; the Striped Bass and Summer Flounder Fishery Management Plans, as well as other fishery management matters.



For further information contact the John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19901; telephone: (302) 674-2331.

Dated: July 28, 1986.

Richard B. Roe, Director,

Office of Fisheries Management, National Marine Fisheries Service.

[FR Doc. 86-17344 Filed 7-31-86; 8:45 am]

BILLING CODE 3510-22-M

# **Marine Mammals; Proposed Permit Modification; Northwest and Alaska Fisheries Center, National Marine Fisheries Service**

Notice is hereby given that the Northwest and Alaska Fisheries Center, National Marine Fisheries Service (NMFS), 7600 Sand Point Way, NE., Seattle, Washington 98115 has requested a modification to Permit No. 561 issued on July 16, 1986, under the authority of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407), the Fur Seal Act of 1966 (16 U.S.C. 1151-1187), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216).

The Permit Holder is requesting to incidentally entangle up to 300 fur seals (*Callorhinus ursinus*) in association with research on interactions between large fragments of marine debris and fur seals.

Concurrent with the publication of this notice in the **Federal Register**, the Secretary of Commerce is forwarding copies of the modification request to the Marine Mammal Commission and the Committee of Scientific Advisors.

Written data or views, or requests for a public hearing on this modification request should be submitted to the Assistant Administrator for Fisheries, NMFS, U.S. Department of Commerce, Washington, D.C. 20235, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries.

The Permit and modification request are available for review by interested persons in the following offices:

Assistant Administrator for Fisheries, NMFS, 1825 Connecticut Avenue, NW., Rm. 805, Washington, DC;  
Director, Northwest Region, NMFS 7600 Sand Point Way, NE, BIN C15700, Seattle, Washington, 98115; and  
Director, Alaska Region, NMFS, 709 West 9th Street, Federal Building, Juneau, Alaska 99802.

Dated: July 29, 1986.

Richard B. Roe,

Director, Office of Fisheries Management, National Marine Fisheries Service.

[FR Doc. 86-17345 Filed 7-31-86; 8:45 am]

BILLING CODE 3510-22-M

## **National Technical Information Service**

### **Intent To Grant Exclusive Patent License**

The National Technical Information Service (NTIS), U.S. Department of Commerce, intends to grant to Cobe Laboratories, having a place of business in Lakewood, Colorado, an exclusive right in Japan to manufacture, use, and sell products embodied in the inventions entitled "Blood Cell Separator" and "Flow Through Centrifuge" U.S. Patent Application Serial Numbers 5-817,016 and 5-861,114. The patent rights in this invention are owned by the United States of America, as represented by the Secretary of Commerce.

The proposed exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.9. The proposed license may be granted unless, within sixty days from the date of this published Notice, NTIS receives written evidence and argument which establishes that the grant of the proposed license would not serve the public interest.

Inquiries, comments and other materials relating to the proposed license must be submitted to the Office of Federal Patent Licensing, NTIS, Box 1423, Springfield, VA 22151.

David T. Mowrey,

Associate Director for the Center for the Utilization of Federal Technology, U.S. Department of Commerce, National Technical Information Service.

[FR Doc. 86-17326 Filed 7-31-86; 8:45 am]

BILLING CODE 3510-04-M

## **COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED**

### **Procurement List 1986; Proposed Additions**

**AGENCY:** Committee for Purchase from the Blind and Other Severely Handicapped.

**ACTION:** Proposed Additions to Procurement List.

**SUMMARY:** The Committee has received proposals to add to Procurement List 1986 commodities to be produced by and services to be provided by workshops

for the blind or other severely handicapped.

Comments Must be Received on or Before: September 3, 1986 ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

### **FOR FURTHER INFORMATION CONTACT:**

C.W. Fletcher, (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 47(a)(2), 85 Stat. 77 and 41 CFR 51-2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities and services listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodities and services to Procurement List 1986, October 15, 1985 (50 FR 41809):

### **Commodities**

File, Work Organizer

7520-00-286-1722

7520-00-286-1723

7520-00-833-7343

Microfiche Programs

7690-00-NSH-0007 B212-S

7690-00-NSH-0008 B214-S.

(Requirements for library of Congress only)

### **Services**

Commissary Shelf Stocking, Custodial and Warehousing Service Hill Air Force Base, Utah.

Operation of the Postal Service Center Elmendorf Air Force Base, Alaska.

C.W. Fletcher,

Executive Director.

[FR Doc. 86-17359 Filed 7-31-86; 8:45 am]

BILLING CODE 5820-33-M

## **Procurement List 1986; Additions and Deletions**

**AGENCY:** Committee for Purchase from the Blind and Other Severely Handicapped.

**ACTION:** Additions to and Deletions from Procurement List.

**SUMMARY:** This action adds to and deletes from Procurement List 1986 commodities to be produced by and a service to be provided by workshops for the blind or other severely handicapped.

**EFFECTIVE DATE:** August 1, 1986.



**ADDRESS:** Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

**FOR FURTHER INFORMATION CONTACT:** C.W. Fletcher, (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** A Notice of Proposed Additions and Deletions to the Procurement List of the commodities and service listed below was published in the Federal Register on May 9 and June 6, 1986 (51 F.R. 17226 and 51 F.R. 20688). One comment was received in response to the notice proposing the deletion of certain requirements for the Liner, Coat, Cold Weather. The commenter questioned the basis for the deletion.

#### Additions

After consideration of the relevant matter presented, the Committee has determined that the commodities and service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c, 85 Stat. 77 and 41 CFR 51-2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered were:

- The actions will not result in any additional reporting, recordkeeping or other compliance requirements.
- The actions will not have a serious economic impact on any contractors for the commodities and service listed.
- The actions will result in authorizing small entities to produce the commodities and service procured by the Government.

Accordingly, the following commodities and service are hereby added to Procurement List 1986:

#### Commodities

Belt, Trousers  
8440-01-167-7246  
8440-01-175-7851  
8440-01-175-7853  
8440-01-175-7850  
8440-01-204-2610  
8440-01-175-7854  
8440-01-175-7852  
8440-01-181-4410  
8440-01-181-4411  
8440-01-204-2610  
8440-01-175-7850

#### Service

Grounds Maintenance  
NASA-Goddard Space Flight Center  
Greenbelt, Maryland

#### Deletions

After consideration of the relevant matter presented, the Committee has

determined that the commodities listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46-48c, 85 Stat. 77 and 41 CFR 51-2.6.

Accordingly, the following commodities are hereby deleted from Procurement List 1986:

Liner, Coat, Cold Weather  
8415-00-782-2886  
8415-00-782-2887  
8415-00-782-2888  
8415-00-782-2889  
8415-00-782-2890  
8415-00-062-0679

(Requirements for Norfolk, Virginia and Tracy, California DLA Depots only)

C.W. Fletcher,

Executive Director.

[FR Doc. 86-17360 Filed 7-31-86; 8:45 am]

BILLING CODE 6820-33-M

#### Procurement List 1986 Additions; Correction

In FR Doc. 86-16180 appearing on page 26033 in the issue of Friday, July 18, 1986, make the following correction:

In the second column, under "Services", the third entry should read: Janitorial/Custodial, USAR Facilities, Mann Hall, North 4415 Market Street, Spokane, Washington and 3800 North Sullivan Road, Trentwood, Washington.

C.W. Fletcher,

Executive Director.

[FR Doc. 86-17361 Filed 7-31-86; 8:45 am]

BILLING CODE 6820-33-M

#### CONSUMER PRODUCT SAFETY COMMISSION

**Interagency Committee on Cigarette and Little Cigar Fire Safety; Ignition Propensity Testing of Patented, Non-Commercial Cigarettes**

**AGENCY:** Interagency Committee on Cigarette and Little Cigar Fire Safety, CPSC.

**ACTION:** Notice.

**SUMMARY:** In the Federal Register of June 16, 1986 (51 FR 21790), the Technical Study Group on Cigarette and Little Cigar Fire Safety (TSG) invited inventors of cigarettes which are not produced commercially but which are claimed to have reduced propensity to ignite upholstered furniture and mattresses to submit samples of such cigarettes for ignition propensity testing. That notice described the testing program and requirements for consideration of cigarette inventions as candidates for testing in this program. That notice specified that only cigarette

inventions for which a patent had been issued or for which a patent application had been filed by June 16, 1986, would be eligible for consideration as candidates for testing in this program. The TSG has revised its criteria for selection of candidate inventions to include any cigarette invention for which a patent has been issued or for which a patent application has been filed by September 30, 1986.

#### FOR FURTHER INFORMATION CONTACT:

Colin B. Church, Office of Program Management, Consumer Product Safety Commission, Washington, D.C. 20207; telephone: (301) 492-6554.

Dated: July 18, 1986.

Colin B. Church,

Federal Employee Designated by the Interagency Committee on Cigarette and Little Cigar Fire Safety.

[FR Doc. 86-17348 Filed 7-31-86; 8:45 am]

BILLING CODE 6355-01-M

#### DEPARTMENT OF DEFENSE

##### Department of the Army

##### Performance Review Boards; Membership List

**AGENCY:** Department of the Army, DOD.  
**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of the names of members of the Performance Review Boards for the Department of the Army.

**EFFECTIVE DATE:** July 22, 1986.

#### FOR FURTHER INFORMATION CONTACT:

Carol D. Smith, Senior Executive Service Office, Directorate of Civilian Personnel, Headquarters, Department of the Army, the Pentagon, Washington, DC 20310-0300, (202) 697-2204.

**SUPPLEMENTARY INFORMATION:** Section 4314 (c)(1) through (5) of Title 5 U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more performance review boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of the senior executives. Each board's review and recommendations will include only those senior executives' appraisals from their respective commands or activities. A consolidated board has been established for those commands that do not have enough senior executives to warrant the establishment of separate boards. Publication of this notice



rescinds notice published in 50 FR 133, dated 11 July 1985, to account for additions and deletions to the membership of those boards previously published.

The members of the Performance Review Board for the Office, Secretary of the Army are:

1. Ms. Susan Crawford, General Counsel, Office, General Counsel, Headquarters, Department of the Army.
2. Mr. Steven Dola, Deputy for Management and Budget, Office, Assistant Secretary of the Army (Civil Works).
3. Mr. Neil R. Ginnetti, Deputy for Planning, Programming, Budgeting and Budget Execution Systems, Office, Assistant Secretary of the Army (Financial Management).
4. Ms. Judy Ann F. Miller, Deputy Assistant Secretary of the Army (Military Personnel, Equal Opportunity and Human Resources), Office, Assistant Secretary of the Army (Manpower and Reserve Affairs).
5. Mr. Stephen R. Burdt, Deputy for Program Evaluation, Office, Assistant Secretary of the Army (Research, Development and Acquisition).
6. Mr. Charles C. O'Donnell, Director, Defense Supply Service-Washington, Office of the Administrative Assistant.
7. Mr. Lewis D. Walker, Deputy for Environmental Safety and Occupational Health, Office, Assistant Secretary of the Army (Installations and Logistics).
8. Ms. Juanita P. Watts, Director, Small and Disadvantaged Business Utilization, Office of the Secretary of the Army.
9. Mr. Robert G. Stockton, Operations Research Analyst for Systems, Office, Under Secretary of the Army.
10. Brigadier General Richard B. Griffiths, Deputy Chief of Public Affairs, Office of Public Affairs, Office of the Secretary of the Army.

The members of the Performance Review Board for the U.S. Army Materiel Command are:

1. Mr. Barry W. McDaniel, Assistant Deputy Chief of Staff for Readiness, Headquarters, U.S. Army Materiel Command.
2. Mr. Archie D. Grimmer, Assistant Deputy Chief of Staff for Personnel, Headquarters, U.S. Army Materiel Command.
3. Mr. Robert O. Weidenmuller, Assistant Deputy Chief of Staff for Cost Analysis, Headquarters, U.S. Army Materiel Command.
4. Mr. Hugh F. Lazar, Director for Product Assurance, U.S. Army Armament, Munitions, and Chemical Command.
5. Mr. Perry C. Stewart, Deputy for Logistics Readiness, U.S. Army Armament, Munitions, and Chemical Command.
6. Dr. Richard M. Carlson, Director, Research & Technology Laboratories, U.S. Army Communications-Electronics Command.
7. Mr. Victor J. Ferlise, Chief Counsel, Research & Technology Laboratories, U.S. Army Communications-Electronics Command.
8. Mr. Thomas R. Dudley, Deputy for Supply Maintenance & Transportation, U.S. Army Depot Systems Command.

9. Dr. Robert J. Lontz, Director, Physics Division, U.S. Army Research Office, U.S. Army Laboratory Command.
10. Dr. Clarence G. Thornton, Director, Electronics Technology & Devices Laboratory, U.S. Army Laboratory Command.
11. Mr. Richard Vitali, Technical Director, U.S. Army Laboratory Command.
12. Mr. Truman W. Howard, III, Director of Product Assurance, U.S. Army Missile Command.
13. Mr. Ernest A. Young, Assistant Deputy for Readiness, U.S. Army Missile Command.
14. Mr. Joseph A. Floyd, Assistant Deputy for Procurement & Readiness, U.S. Army Tank-Automotive Command.
15. Mr. Grady H. Bannister, Jr., Technical Director, Electronic Providing Ground, U.S. Army Test and Evaluation Command.
16. Mr. Harold L. Mabrey, Deputy for Procurement & Production, U.S. Army Troop Support Command.
17. Mr. Arend H. Reid, Chief, Combat Support Division, U.S. Army Materiel Systems Analysis Activity.
18. Mr. Paul Donovan, Assistant Deputy Chief of Staff for Security Assistant, Headquarters, U.S. Army Materiel Command.
19. Mr. Roy D. Greene, Assistant Deputy Chief of Staff for Program Management, Headquarters, U.S. Army Materiel Command.
20. Mr. Marvin L. Hancks, Chief Counsel, Rock Island Arsenal, U.S. Army Armament, Munitions and Chemical Command.
21. Mr. Jimmie C. Morgan, Deputy for Procurement & Production, Rock Island Arsenal, U.S. Army Armament, Munitions and Chemical Command.
22. Mr. John L. Shipley, Deputy Director, Applied Technology Laboratory, Research and Technology Laboratory, U.S. Army Aviation Systems Command.
23. Mr. Robert F. Giordano, Director, Electronic Warfare/Reconnaissance Surveillance Target Acquisition Directorate, U.S. Army Communications-Electronics Command.
24. Mr. David E. Bahr, Deputy for Command Operations, U.S. Army Depot Systems Command.
25. Mr. Walter W. Pattishall, Associate Technical Director for Electronic Warfare & Intelligence, U.S. Army Laboratory Command.
26. Dr. Jimmie R. Suttle, Director, Electronics Division, U.S. Army Research Office, U.S. Army Laboratory Command.
27. Dr. Edward S. Wright, Director, Army Materials & Technology Laboratory, U.S. Army Laboratory Command.
28. Dr. Richard G. Rhoades, Associate Director for Technology, U.S. Army Missile Command.
29. Mr. Lowell H. Barnett, Director of Product Assurance, U.S. Army Tank-Automotive Command.
30. Mr. James A. Wise, III, Technical Director, National Range Operations, U.S. Army Test and Evaluation Command.
31. Dr. Abner S. Salant, Director, Food Engineering Laboratory, U.S. Army Natick Research, Development and Engineering Center, U.S. Army Troop Support Command.
32. Mr. John W. Kramar, Chief, Ground Warfare Division, U.S. Army Materiel Systems Analysis Activity.

33. Major General James R. Klugh, Deputy Chief of Staff for Personnel, Headquarters, U.S. Army Materiel Command.

34. Brigadier General Peter D. Hidalgo, Commander, Chemical Research, Development and Engineering Center, U.S. Army Armament, Munitions and Chemical Command.

35. Brigadier General William H. Forster, Deputy Commanding General, U.S. Army Aviation Systems Command.

36. Brigadier General Harry G. Karegeannes, Deputy, Commanding General, U.S. Army Communications-Electronics Command.

37. Brigadier General John S. Drosdeck, Jr., Deputy Commanding General, U.S. Army Missile Command.

38. Brigadier General Walter W. Kastenmayer, Deputy Chief of Staff for Chemical and Nuclear Matters, Headquarters, U.S. Army Materiel Command.

39. Brigadier General Guy P. Bowen, Executive Director for Conventional Ammunition, Headquarters, U.S. Army Materiel Command.

The members of the Performance Review Boards for the Office of the Chief of Staff, Army and the Consolidated Commands are:

1. Brigadier General Robert M. Bunker, Director of Management, Office, Chief of Staff Army.
2. Ms. Joann Langston, Director, Study Program Management Office, Office, Chief of Staff Army.
3. Dr. Julius Bellaschi, Deputy Director, Program Analysis and Evaluation, Office, Chief of Staff Army.
4. Mr. Edgar B. Vandiver, III, Director, Concepts Analysis Agency.
5. Mr. Philip E. Louer, Director of Methodology, Resources & Computation, Concepts Analysis Agency.
6. Mr. Daniel J. Shedlowski, Assistant Director for Strategy, Concepts, & Plans, Concepts Analysis Agency.
7. Brigadier General Randall A. Greenwalt, Deputy Assistant Chief of Staff for Intelligence.
8. Mr. James Davis, Special Assistant to the Assistant Chief of Staff for Intelligence.
9. Major General Robert J. Donahue, Deputy Assistant Chief of Staff for Information Management.
10. Brigadier General Samuel A. Leffler, Director, Architecture & Design, Office, Assistant Chief of Staff for Information Management.
11. Mr. Earl J. Holliman, Army Spectrum Manager, Office, Assistant Chief of Staff for Information Management.
12. Brigadier General Donald W. Hansen, Assistant Judge Advocate General for Military Law.
13. Mr. Dellon E. Coker, Special Assistant to the Judge Advocate General.
14. Major General John S. Crosby, Assistant Deputy Chief of Staff for Personnel.
15. Brigadier General Claude E. Fernandez, Jr., Director, Manpower Programs & Budget, Office Deputy Chief of Staff for Personnel.
16. Dr. Edgar M. Johnson, Technical Director, U.S. Army Research Institute.



17. Dr. Newell Kent Eaton, Associate Director, U.S. Army Research Institute.
18. Dr. Robin L. Keese, Associate Director, Army Research Institute.
19. Mr. Gary L. Purdum, Deputy Director of Manpower, Programs & Budget, Office, Deputy Chief of Staff for Personnel.
20. Mr. Raymond J. Sumser, Director of Civilian Personnel, Office, Deputy Chief of Staff for Personnel.
21. Mr. Charles W. Weatherholt, Deputy Director of Civilian Personnel, Office, Deputy Chief of Staff for Personnel.
22. Ms. Anna Yurkoski, Chief of Employment & Classification, Office, Deputy Chief of Staff for Personnel.
23. Major General Richard G. Graves, Assistant Deputy Chief of Staff for Operations and Plans.
24. Major General Jack O. Bradshaw, Director, Strategic Plans & Policies, Office, Deputy Chief of Staff for Operations and Plans.
25. Dr. Charles N. Davidson, Technical Director, U.S. Army Nuclear & Chemical Agency.
26. Mr. Herbert K. Fallin, Jr., Technical Advisor to the Deputy Chief of Staff for Operations and Plans.
27. Major General Vincent M. Russo, Assistant Deputy Chief of Staff for Logistics.
28. Major General Charles W. Brown, Assistant Deputy Chief of Staff for Logistics (Security Assistance).
29. Major General Edward Honor, Director for Transportation, Energy & Troop Support, Office, Deputy Chief of Staff for Logistics.
30. Major General David W. Stallings, Director for Contracting, Office, Deputy Chief of Staff for Logistics.
31. Ms. Mary E. Harvey, Assistant Director for Supply, Supply & Maintenance Directorate, Office, Deputy Chief of Staff for Logistics.
32. Mr. James B. Emahiser, Assistant Director for Maintenance, Supply & Maintenance Directorate, Office Deputy Chief of Staff for Logistics.
33. Mr. William L. Jackson, Chief, Security Assistant Policy Coordination Office, Office, Deputy Chief of Staff for Logistics.
34. Mr. James T. Brown, Assistant Director for Resources & Management, Office, Deputy Chief of Staff for Logistics.
35. Major General Jerry Max Bunyard, Assistant Deputy Chief of Staff for Research, Development Acquisition.
36. Brigadier General Billy M. Thomas, Deputy Director, Combat Support Systems, Office, Deputy Chief of Staff for Research, Development Acquisition.
37. Dr. Louis M. Cameron, Director of Army Research & Technology, Office, Deputy Chief of Staff for Research, Development Acquisition.
38. Mr. Hunter M. Woodall, Research, Development Acquisition Analysis Officer, Office, Deputy Chief of Staff for Research, Development Acquisition.
39. Major General James F. McCall, Director of Army Budget, Office, Comptroller of Army.
40. Mr. Clyde E. Jeffcoat, Principal Deputy, U.S. Army Finance & Accounting Center.
41. Mr. Arthur T. Walker, Deputy Director of Army Budget, Office, Comptroller of the Army.
42. Mrs. Mary H. Smith, Director of Resource Management Systems, Office, Comptroller of the Army.
43. Mr. Isaac E. Barbre, Deputy Auditor General.
44. Mr. Michael A. Janoski, Director of Acquisition & Systems Audit, Army Audit Agency.
45. Mr. Thomas A. Grant, Director of Personnel & Force Management Audits, Army Audit Agency.
46. Mr. Henry J. Fischer, Jr., Director of Audit Policy, Plans & Resources, Army Audit Agency.
47. Major General Eugene Fox, Deputy Commanding General, U.S. Army Strategic Defense Command.
48. Dr. Carl G. Davis, Chief, Battle Management Division, U.S. Army Strategic Defense Command.
49. Dr. William O. Davies, Jr., Director, Systems Analysis/Battle Management, U.S. Army Strategic Defense Command.
50. Dr. James R. Risher, Director, Sensors Directorate, U.S. Army Strategic Defense Command.
51. Mr. Donald D. Schenk, Chief, Active Sensors Division, U.S. Army Strategic Defense Command.
52. Mr. Elmer M. Mitchell, Chief, Discrimination Division, U.S. Army Strategic Defense Command.
53. Mr. Frank Vann, Chief, Passive Sensors Division, U.S. Army Strategic Defense Command.
54. Brigadier General Paul C. Hurley, Commanding General, Eastern Area, Military Traffic Management Command.
55. Brigadier General Charles A. Vickery, U.S. Air Force, Vice Commander, Military Traffic Management Command.
56. Mr. Joseph P. Cribbens, Special Assistant to the Deputy Chief of Staff for Logistics.
57. Major General J. Hollis V. McCrea, Jr., Deputy Chief of Staff, Personnel, Administration & Logistics, U.S. Army Training and Doctrine Command.
58. Major General M. Krausz, Deputy Chief of Staff, Combat Development, U.S. Army Training and Doctrine Command.
59. Brigadier General William H. Reno, Deputy Chief of Staff, Resource Management, U.S. Army Training and Doctrine Command.
60. Major General Robert L. Drudik, Commander, Combined Arms Test Activity, U.S. Army Training and Doctrine Command.
61. Mr. Larry C. Hanson, Deputy Chief of Staff for Resource Management, U.S. Army Training and Doctrine Command.
62. Major General Robert H. Forman, Chief of Staff, U.S. Army Training and Doctrine Command.
63. Mr. Leon F. Goode, Jr., Director, System Analysis Activity, U.S. Army Training and Doctrine Command.
64. Dr. Darrel W. Collier, Scientific Advisor, Combined Arms Test Activity, U.S. Army Training and Doctrine Command.
65. Dr. Wilbur B. Payne, Director, Operations Research Activity, U.S. Army Training and Doctrine Command.
66. Mr. Arthur C. Christman, Jr., Scientific Advisory, Office Deputy Chief of Staff for Combat Developments, U.S. Army Training and Doctrine Command.
67. Dr. Marion R. Bryson, Director, U.S. Army Combat Development Experimentation Center, Combat Development Experimentation Command.
68. Major General Carl H. McNair, Jr., Chief of Staff, U.S. Army Training and Doctrine Command.
69. Mr. James F. Fox, Scientific Advisor, Combined Arms Combat Development Activity, U.S. Army Training and Doctrine Command.
70. Mr. Raymond V. Michael, Assistant Deputy Chief of Staff for Personnel, Administration & Logistics, U.S. Army Training and Doctrine Command.
71. Major General Thomas J.P. Jones, Deputy Chief of Staff for Personnel, U.S. Army Forces Command.
72. Brigadier General H.M. Hagwood, Comptroller, U.S. Army Forces Command.
73. Mr. William S. Fraim, Civilian Personnel Director, U.S. Army Forces Command.
74. Mr. William M. Wilkinson, Deputy Comptroller, U.S. Army Forces Command.
75. Major General Archie S. Cannon, Deputy Chief of Staff for Personnel, U.S. Army Europe.
76. Major General Scott B. Smith, Deputy Chief of Staff for Engineers, U.S. Army Europe.
77. Mr. Andrew F. Foreman, Assistant Deputy Chief of Staff for Personnel (Civilian Personnel) U.S. Army Europe.
78. Mr. Carey C. Jones, Assistant Deputy Chief of Staff for Engineers, U.S. Army Europe.
79. Major General Bruce R. Harris, Deputy Chief of Staff, U.S. Army Information Systems Command.
80. Brigadier General Alan B. Salisbury, Commanding General, U.S. Army Information Systems Engineering Command.
81. Mr. Leonard J. Mabus, Technical Director, U.S. Army Information Systems Command.
82. Mr. Feliciano Giordano, Technical Director, U.S. Army Communications Systems Agency.
83. Mr. Frederick L. Orr, Comptroller, U.S. Army Information Systems Command.
84. Mr. Gale W. Parks, Director, U.S. Army Systems Selection & Acquisition Agency.
85. Mr. Ralph L. Gunn, Director, U.S. Army Management Systems Support Agency.
86. Brigadier General John H. Stanford, Commanding General, Western Area, Military Traffic Management Command.
87. Dr. Harry M. West, III, Deputy Comptroller of the Army.

The members of the Performance Review Board for the Office of The Surgeon General are:

1. Brigadier General Robert H. Baker, M.D., Deputy Surgeon General.
2. Major General H. Thomas Chandler, D.D.S., Assistant Surgeon General for Dental Services/Director of Personnel.
3. Major General Garrison Rapmund, M.D., Commander, U.S. Army Medical Research and Development Command.
4. Brigadier General Walter F. Johnson, III, M.D., Director of Health Care Operations, Office of the Surgeon General.



5. Brigadier General Connie L. Slewitzke, RN, Chief, Army Nurse Corps, Office of the Surgeon General.

6. Brigadier General Robert R. Jorgensen, Assistant Surgeon General for Veterinary Services, Office of the Surgeon General.

7. Gunter F. Bahr, M.D., Chairman, Department of Cellular Pathology, Armed Forces Institute of Pathology.

8. Louis S. Baron, Ph.D., Chief, Department of Bacterial Immunology, Walter Reed Army Institute of Research.

9. Daniel H. Connor, M.D., Chairman, Department of Infectious and Parasitic Disease Pathology, Armed Forces Institute of Pathology.

10. Bhupendra P. Doctor, Ph.D., Director, Division of Biochemistry, Walter Reed Army Institute of Research.

11. Robert R. Engle, Ph.D., Deputy Director, Division of Experimental Therapeutics, Walter Reed Army Institute of Research.

12. Franz M. Enzinger, M.D., Chairman, Department of Soft Tissue Pathology, Armed Forces Institute of Pathology.

13. Samuel B. Formal Ph.D., Chief, Department of Bacterial Diseases, Walter Reed Army Institute of Research.

14. Elson D. Helwig, M.D., Chairman, Department of Skin and Gastrointestinal Pathology, Armed Forces Institute of Pathology.

15. Nelson S. Irey, M.D., Chairman, Department of Environmental and Drug Induced Pathology, Armed Forces Institute of Pathology.

16. Kamal G. Ishak, M.D., Chairman, Department of Hepatic Pathology, Armed Forces Institute of Pathology.

17. Frank B. Johnson, M.D., Chairman, Department of Chemical Pathology, Armed Forces Institute of Pathology.

18. Arthur D. Mason, Jr., M.D., Chief, Laboratory Division, U.S. Army Institute of Surgical Research.

19. Fathollah K. Mostofi, M.D., Chairman, Center for Advanced Pathology, Armed Forces Institute of Pathology.

20. Henry J. Norris, M.D., Chairman, Department of Gynecologic and Breast Pathology, Armed Forces Institute of Pathology.

21. Howard E. Noyes, Ph.D., Associate Director for Research Management, Walter Reed Army Institute of Research.

22. Donald E. Sweet, M.D., Chairman, Department of Orthopedic Pathology, Armed Forces Institute of Pathology.

23. James A. Vogel, Ph.D., Director, Exercise Physiology Division, U.S. Army Research Institute of Environmental Medicine.

The members of the Performance Review Board for the U.S. Army Corps of Engineers are:

1. Major General Norman G. Delbridge, Jr., Deputy Chief of Engineers, Headquarters, U.S. Army Corps of Engineers.

2. Brigadier General Charles E. Dominy, Division Commander, Missouri River Division.

3. Brigadier General C.E. Edgar, III, Division Commander, South Atlantic Division.

4. Mr. Kisuk Cheung, Chief, Engineering Division, Pacific Ocean Division.

5. Mr. Cecil G. Goad, Chief, Operations and Readiness Division, Directorate of Civil Works, Headquarters, U.S. Army Corps of Engineers.

6. Dr. Richard B. Gomez, Physical Scientists (Atmospheric Science), Directorate of Research and Development, Headquarters, U.S. Army Corps of Engineers.

7. Mr. Alfred P. Hutchinson, Chief, Construction-Operations Division, Southwestern Division.

8. Mr. Bory Steinberg, Chief, Program Division, Directorate of Civil Works, Headquarters, U.S. Army Corps of Engineers.

9. Brigadier General James W. Roy, Division Commander, Europe Division.

10. Brigadier General Thomas A. Sands, Division Commander, Lower Mississippi Valley Division.

11. Mr. Bob O. Benn, Assistant Director for Research and Development (Military Programs), Headquarters, U.S. Army Corps of Engineers.

12. Mr. George Erie, Deputy Director, Resource Management, Headquarters, U.S. Army Corps of Engineers.

13. Mr. Edward T. Watling, Chief, Facilities Engineering Division, Headquarters, U.S. Army Corps of Engineers.

14. Mr. Herbert H. Kennon, Chief, Engineering Division, North Pacific Division.

15. Mr. Kenneth Murdock, Chief, Planning Division, North Central Division.

Carol D. Smith,

Chief, Senior Executive Service Office.

[FR Doc. 86-17333 Filed 7-31-86; 8:45 am]

BILLING CODE 3710-08-M

## Corps of Engineers, Department of the Army

### Chief of Engineers Environmental Advisory Board Meeting

**AGENCY:** U.S. Army Corps of Engineers, DOD.

**ACTION:** Notice of Open Meeting.

**SUMMARY:** Under section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463) this notice sets forth the schedule and proposed agenda of the forthcoming meeting of the Chief of Engineers Environmental Advisory Board (EAB). The meeting is to be jointly chaired by Dr. Evan C. Vlachos, Chairman, EAB, and Lieutenant General E.R. Heiberg III, Chief of Engineers, U.S. Army. The meeting is open to the public. **DATE:** The meeting will be held from 8:00 a.m., Tuesday, August 26, 1986, to 11:00 a.m., Thursday, August 28, 1986.

**ADDRESS:** The meeting will be held at the Holiday Inn Central, Omaha, Nebraska.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Colonel Kit J. Valentine, Chief, Office of Environmental Overview or Captain Glen J. Lozier, Office of the Chief of Engineers,

Washington, DC 20314-1000, (202) 272-0166.

**SUPPLEMENTARY INFORMATION:** The schedule and proposed agenda of the Environmental Advisory Board meeting is:

#### 26 August—Tuesday—A.M. Session

8:00—Meeting convened—Opening remarks

8:40—Old business

9:20—Charge to the EAB for Hazardous Waste Disposal—Assistant Chief of Engineers

10:00—Hazardous Waste cleanup at Army Installations

10:15—Examples of the Army Program

#### P.M. Session

1:30—Panel Discussion: Lessons learned in Hazardous Waste Cleanups at USACE

3:00—Research and Development

3:45—Charge to the EAB for Groundwater Discussions—Director of Civil Works

4:10—USCS—Groundwater Mission

5:00—Meeting recess

#### 27 August—Wednesday—A.M. Session

8:00—EPA Panel: Groundwater Mission

10:00—Bureau of Reclamation—Mission and Ogallala Study

11:00—Corps Groundwater Activities

#### P.M. Session

1:00—EPA, USGS, BUR REC, & USACE Panel

Discussion: Innovative Technology in Groundwater Studies

3:15—MRO Denver Water Supply Study

4:30—Meeting recess

#### 28 August—Thursday—A.M. Session

8:00—EAB Report to the Chief of Engineers

9:30—Chief of Engineers Response

10:30—Public comments

11:00—Meeting adjournment

Kit J. Valentine,

LTC, Corps of Engineers, Chief, Office of Environmental Overview.

[FR Doc. 86-17332 Filed 7-31-86; 8:45 am]

BILLING CODE 3710-08-M

## DEPARTMENT OF ENERGY

### Economic Regulatory Administration

[Docket No. ERA C&E 86-43; OFP Case No. 61061-9317-20-24]

### Corona CoGen, Inc.; Exemption

**AGENCY:** Economic Regulatory Administration, Energy.

**ACTION:** Order granting Corona CoGen, Inc. exemption from the prohibitions of the Powerplant and Industrial Fuel Use Act of 1978.

**SUMMARY:** The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) hereby gives notice that it has granted a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel



Use Act of 1978, 42 U.S.C. 8301 *et seq.* ("FUA" or "the Act") to Corona Cogen, Inc. (Corona CoGen or "the petitioner"). The permanent exemption permits the use of natural gas as the primary energy source in a new powerplant facility located in Corona, Riverside County, California, based on the lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum. The final exemption order and detailed information on the proceeding are provided in the **SUPPLEMENTARY INFORMATION** section, below.

**DATES:** The order shall take effect on September 30, 1986. The public file containing a copy of the order, other documents, and supporting materials on this proceeding is available upon request through DOE, Freedom of Information Reading Room, 1000 Independence Avenue, SW., Room 1E-190, Washington, DC 20585, Monday through Friday, 9:00 a.m. to 4:00 p.m., except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Myra L. Couch, Office of Fuels Programs, Economic Regulatory Administration, 1000 Independence Avenue, SW., Room GA-093, Washington, DC 20585, Telephone: (202) 252-6769.

Steven E. Ferguson, Esq., Office of General Counsel, Department of Energy, Forrestal Building, Room 6A-113, 1000 Independence Avenue, SW., Washington, DC 20585, Telephone: (202) 252-6947.

**SUPPLEMENTARY INFORMATION:** On May 13, 1986, Corona CoGen petitioned ERA under section 212 of FUA and 10 CFR 503.32 for a permanent exemption to permit the use of natural gas in a new powerplant. The petition for exemption is based on the lack of an alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum.

**Basis for Permanent Exemption Order**

The permanent exemption order is based upon evidence in the record that shows that in accordance with the requirements of 10 CFR 503.32(b), Corona CoGen has submitted the following evidence in order to make the demonstration required by that section:

(1) Duly executed certifications required under paragraph (a) of that section;

(2) Exhibits containing the basis for certifications required under paragraph (a) of that section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of those regulations;

(4) Fuels search, as required under § 503.14 of those regulations; and

(5) All data required by § 503.6 (cost calculation) of those regulations necessary for computing the cost calculation formula.

**NEPA Compliance**

After review of the petitioner's environmental impact analysis, together with other relevant information, ERA has determined that the granting of the requested exemption does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA).

**Procedural Requirements**

In accordance with the procedural requirements of section 701(c) of FUA and 10 CFR 501.3(b), ERA published its Notice of Acceptance of Petition and Availability of Certification in the **Federal Register** on June 4, 1986 (51 FR 20335), commencing a 45-day public comment period.

A copy of the petition was provided to the Environmental Protection Agency for comments as required by section 701(f) of the Act. During the comment period, interested persons were afforded an opportunity to request a public hearing. The comment period closed on July 21, 1986; no comments were received and no hearing was requested.

**Order Granting Permanent Exemption**

Based upon the entire record of this proceeding, ERA has determined that Corona CoGen has satisfied the eligibility requirements for the requested permanent exemption, as set forth in 10 CFR 503.32(b). Therefore, pursuant to section 212 of FUA, ERA hereby grants a permanent exemption to Corona CoGen to permit the use of natural gas as the primary energy source for the new powerplant in Corona, Riverside County, California.

Pursuant to section 702(c) of the Act and 10 CFR 501.69 any person aggrieved by this order may petition for judicial review thereof at any time before the 60th day following the publication of this order in the **Federal Register**.

Issued in Washington, DC, on July 24, 1986.

Robert L. Davies,

Director, Office of Fuels Program, Economic Regulatory Administration.

[FR Doc. 86-17395 Filed 7-31-86; 8:45 am]

BILLING CODE 6450-01-M

[Docket No. ERA C&E 86-42; OFP Case No. 67054-9320-20, 21-24]

**Sierra CoGen, Inc.; Exemption**

**AGENCY:** Economic Regulatory Administration, Energy.

**ACTION:** Order granting Sierra CoGen, Inc. exemption from the prohibitions of the Powerplant and Industrial Fuel Use Act of 1978.

**SUMMARY:** The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) hereby gives notice that it has granted a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8301 *et seq.* ("FUA" or "the Act") to Sierra CoGen, Inc. (Sierra CoGen or "the petitioner"). The permanent exemption permits the use of natural gas as the primary energy source in a new powerplant facility located in Bakersfield, California, based on the lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum. The final exemption order and detailed information on the proceeding are provided in the **Supplementary Information** section, below.

**DATES:** The order shall take effect on September 30, 1986. The public file containing a copy of the order, other documents, and supporting materials on this proceeding is available upon request through DOE, Freedom of Information Reading Room, 1000 Independence Avenue, SW., Room 1E-190, Washington, DC 20585, Monday through Friday, 9:00 a.m. to 4:00 p.m., except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Myra L. Couch, Office of Fuels Programs, Economic Regulatory Administration, 1000 Independence Avenue, SW., Room GA-093, Washington, DC 20585, Telephone: (202) 252-6769.

Steven E. Ferguson, Esq., Office of General Counsel, Department of Energy, Forrestal Building, Room 6A-113, 1000 Independence Avenue, SW., Washington, DC 20585, Telephone: (202) 252-6947.

**SUPPLEMENTARY INFORMATION:** On May 13, 1986, Sierra CoGen petitioned ERA under section 212 of FUA and 10 CFR 503.32 for a permanent exemption to permit the use of natural gas in a new powerplant. The petition for exemption is based on the lack of an alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum.



**Basis For Permanent Exemption Order**

The permanent exemption order is based upon evidence in the record that shows that in accordance with the requirements of 10 CFR 503.32(b), Sierra CoGen has submitted the following evidence in order to make the demonstration required by that section:

- (1) Duly executed certification required under paragraph (a) of that section;
- (2) Exhibits containing the basis for certifications required under paragraph (a) of that section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);
- (3) Environmental impact analysis, as required under § 503.13 of those regulations;
- (4) Fuels search, as required under § 503.14 of those regulations; and
- (5) All data required by § 503.6 (cost calculation) of those regulations necessary for computing the cost calculation formula.

**NEPA Compliance**

After review of the petitioner's environmental impact analysis, together with other relevant information, ERA has determined that the granting of the requested exemption does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA).

**Procedural Requirements**

In accordance with the procedural requirements of section 701(c) of FUA and 10 CFR 501.3(b), ERA published its Notice of Acceptance of Petition and Availability of Certification in the *Federal Register* on June 4, 1986 (51 FR 20336), commencing a 45-day public comment period.

A copy of the petition was provided to the Environmental Protection Agency for comments as required by section 701(f) of the Act. During the comment period, interested persons were afforded an opportunity to request a public hearing. The comment period closed on July 21, 1986; no comments were received and no hearing was requested.

**Order Granting Permanent Exemption**

Based upon the entire record of this proceeding, ERA has determined that Sierra CoGen has satisfied the eligibility requirements for the requested permanent exemption, as set forth in 10 CFR 503.32(b). Therefore, pursuant to section 212 of FUA, ERA hereby grants a permanent exemption to Sierra CoGen to permit the use of natural gas as the

primary energy source for the new powerplant in Bakersfield, California.

Pursuant to section 702(c) of the Act and 10 CFR 501.69 any person aggrieved by this order may petition for judicial review thereof at any time before the 60th day following the publication of this order in the *Federal Register*.

Issued in Washington, DC, on July 24, 1986.  
Robert L. Davies,  
Director, Office of Fuels Program, Economic  
Regulatory Administration.  
[FR Doc. 86-17396 Filed 7-30-86; 8:45 am]  
BILLING CODE 6450-01-M

**Federal Energy Regulatory Commission**

[Docket Nos. ER85-725-002 et al.]

**Northern States Power Co. et al.;  
Electric Rate and Corporate  
Regulation Filings**

Take notice that the following filings have been made with the Commission:

**1. Northern States Power Company**

[Docket No. ER85-725-002]  
July 25, 1986.

Take notice that on July 21, 1986, Northern States Power Company (Wisconsin) tendered for filing a letter stating that all of the wholesale customers had paid the settlement rates approved by the Commission for this docket, so that no refunds were owed to any customer.

Northern States Company (Wisconsin) has forwarded copies of the letter to the Public Service Commission of Wisconsin and to the Michigan Public Service Commission.

Comment date: August 7, 1986, in accordance with Standard Paragraph E at the end of this notice.

**2. Commonwealth Edison Company**

[Docket Nos. ER86-76-009 and ER86-230-005]  
July 25, 1986.

Take notice that on July 18, 1986, Commonwealth Edison Company tendered for filing Rate 80 and Rate 81 and related Riders 9 and 23.

Rate 80 and Rate 81 and the related Riders provide for service and use of the facilities necessary to enable the City of Geneva, Illinois and the City of Rock Falls, Illinois, respectively, to take delivery of electricity from electric utility suppliers other than Commonwealth Edison and are filed in compliance with an Order of the Federal Energy Regulatory Commission entered on June 18, 1986, in Docket No. ER86-76-004, ER86-76-005, ER86-230-002 and ER86-230-003.

Copies of the rate schedules were served upon the Illinois Commerce Commission, Springfield, Illinois, the Cities of Geneva, Rock Falls, Batavia and Naperville, Illinois, and the Illinois Municipal Electric Agency.

Comment date: August 7, 1986, in accordance with Standard Paragraph E at the end of this notice.

**3. The Connecticut Light and Power Company**

[Docket No. ER86-606-000]  
July 28, 1986.

Take notice that on July 21, 1986, Connecticut Light and Power Company (CL&P) tendered for filing a proposed rate schedule pertaining to a sales agreement (Agreement) with respect to Montville and Middletown Units between CL&P and UNITIL Power Corp. (UNITIL) dated as of June 1, 1986.

CL&P states that the rate schedule provides for a sale to UNITIL of capacity and energy from CL&P's Montville Units Nos. 5 and 6 and Middletown Units Nos. 2, 3, and 4 (the Units) during the period October 1, 1986, to October 31, 1992, together with related transmission service.

CL&P requests that the Commission permit the rate schedule filed to become effective on October 1, 1986.

CL&P states that the capacity charge rate for the first twenty-five months for the proposed service is a negotiated rate, based on the market price for this capacity, and less than cost-of-service rate. The capacity charge for the remainder of the term is determined on a cost-of-service basis at the time that the Agreement was executed. The monthly transmission charge rate is equal to one-twelfth of the annual average cost of transmission service on the transmission systems of CL&P and its affiliated Northeast Utilities companies at the time that the Agreement was executed and is determined in accordance with § 13.9 of the New England Power Pool (NEPOOL) Agreement and the uniform rules adopted by the NEPOOL Executive Committee. The monthly Transmission Charge is determined by the product of (i) the appropriate monthly transmission charge rate (\$/kw-month) and (ii) the number of kilowatts of winter capability which UNITIL is entitled to receive during such month. This charge is reduced to give due recognition of the payments made by UNITIL to intervening systems providing transmission service over Pool Transmission Facilities for the delivery of the purchase provided under the Agreement. The Energy Charge and the



Station Service Energy Charge are based on UNITIL's portion of the applicable fuel expenses and no special cost-of-service studies were made to derive these charges.

CL&P states that the services to be provided under the Agreement are similar to services provided by CL&P pursuant to purchase agreements with Vermont Electric Generation and Transmission Cooperative, Inc. (FERC Rate Schedule No. CL&P 350).

CL&P states that a copy of this filing has been mailed to UNITIL, Bedford, NH.

CL&P further states that the filing is in accordance with Part 35 of the Commission's Regulations.

Comment date: August 11, 1986, in accordance with Standard Paragraph E at the end of this notice.

#### 4. The Kansas Power and Light Company

[Docket No. ER86-605-000]

July 28, 1986.

Take notice that on July 21, 1986, Kansas Power and Light Company (KPL) tendered for filing a newly executed renewal contract dated June 9, 1986, with the City of Sterling for wholesale service to that community. KPL states that this contract permits the City of Sterling to receive service under rate schedule WTU-12/83 designated Supplement No. 8 to R.S. FERC No. 187. The proposed effective date is July 1, 1986. The proposed contract change provides essentially for the ten year extension of the original terms of the presently approved contract. In addition, KPL states that copies of the contract have been mailed to the City of Sterling and the State Corporation Commission.

Comment date: August 11, 1986, in accordance with Standard Paragraph E at the end of this document.

#### 5. Long Island Lighting Company

[Docket No. ER86-476-000]

July 28, 1986.

Take notice that on July 21, 1986, Long Island Lighting Company ("LILCO") tendered for filing a proposed supplement to its Contract No. 139 between LILCO and the Incorporated Village of Freeport for the interchange of emergency electric power between them.

The purpose of this supplement to the interchange agreement is for Freeport to provide LILCO with 23,000 kw of firm capacity for the time period November 1, 1985 to October 31, 1986; to set the price of any energy provided during that time period; and to enable Freeport continued access to LILCO's

transmission system during that time period.

Copies of this filing were served upon the New York Power Authority, The Municipal Electric Utilities Association of New York State, the Incorporated Village of Freeport and the New York State Public Service Commission.

Comment date: August 11, 1986, in accordance with Standard Paragraph E at the end of this notice.

#### 6. Long Island Lighting Company

[Docket No. ER86-477-000]

July 28, 1986.

Take notice that on July 21, 1986, Long Island Lighting Company ("LILCO") tendered for filing a proposed supplement to its Rate Schedule FERC No. 15 between LILCO and the Incorporated Village of Freeport. The purpose of this supplement is to amend the fuel cost adjustment provision that is applicable to energy sales made under this rate schedule.

Copies of this filing were served upon the New York State Public Service Commission and Incorporated Village of Freeport.

Comment date: August 11, 1986, in accordance with Standard Paragraph E at the end of this notice.

#### 7. Niagara Mohawk Power Corporation

[Docket No. ER86-604-000]

July 28, 1986.

Take notice that on July 21, 1986, Niagara Mohawk Power Corporation (Niagara), tendered for filing as a rate schedule, an agreement between Niagara and the Rochester Gas and Electric Corporation (Rochester) dated June 5, 1986.

Niagara presently has on file an agreement with Rochester dated April 12, 1973 last amended on May 15, 1985. This agreement is designated as Niagara Mohawk Power Corporation Rate Schedule F.E.R.C. No. 76. This new agreement is being transmitted as a supplement to the existing agreement.

The original April 12, 1973 agreement states that Niagara will provide for the transmission of power and energy to and from the Power Authority of the State of New York at the Blenheim-Gilboa Pumped Storage Plant for Rochester. This supplement revises the rate to be paid by Rochester for the use of Niagara's facilities. The monthly charge will be updated on October 1 of each succeeding year using Niagara's most recent annual fixed charges. Niagara requests the Commission to allow said agreement to become effective as of October 1, 1986.

Copies of the filing were served upon the Rochester Gas & Electric

Corporation of Rochester, New York and Public Service Commission of Albany, New York.

Comment date: August 11, 1986, in accordance with Standard Paragraph E at the end of this notice.

#### 8. Public Service Company of New Hampshire

[Docket No. ER86-607-000]

July 28, 1986.

Take notice that on July 22, 1986, Public Service Company of New Hampshire ("PSNH") tendered for filing an initial rate for transmission service to be provided to Pontook Hydro Limited Partnership by PSNH over its 115 kV and above transmission facilities.

The rate applicable to the provision of transmission service is \$2.16 per KW, per month, determined pursuant to the formula contained in the Transmission Agreement between PSNH and Pontook Hydro Limited Partnership dated July 26, 1985 and will be updated as provided in said Agreement.

Copies of the filing were served upon Pontook Funding Corporation, Pontook Hydro Limited Partnership and the New Hampshire Public Utilities Commission.

Comment date: August 11, 1986, in accordance with Standard Paragraph E at the end of this notice.

#### Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

FR Doc. 86-17321 Filed 7-31-86; 8:45 am]

BILLING CODE 6717-01-M

#### Office of Energy Research

#### Energy Research Advisory Board; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub.



L. 92-463, 86 Stat. 770), notice is hereby given of the following meeting:

Name: Energy Research Advisory Board (ERAB).

Date and time: August 26, 1986, 9 a.m.-4:30 p.m.; August 27, 1986, 9 a.m.-12 Noon; August 28, 1986, 9 a.m.-12 Noon.

Place: Brookhaven National Laboratory, Berkner Hall, Conference Room B, Brookhaven Avenue, Upton, NY 11973, Telephone: 516/282-7989.

Contact: Sarah Goldman, Department of Energy, Office of Energy Research, ER-6, 1000 Independence Avenue SW., Washington, DC 20585, Telephone: 202/252-5779.

Purpose of the Board: To advise the Department of Energy (DOE) on the overall research and development conducted in DOE and to provide long-range guidance in these areas to the Department.

Tentative Agenda: The specific agenda items and times are subject to last minute changes. Visitors planning to attend for a specific topic should confirm the time prior to and during the day of the meeting.

#### Tentative Agenda

##### August 26, 1986

9:00 a.m.—Administrative Matters

9:15 a.m.—Welcoming Remarks;  
Summary of Brookhaven National  
Laboratory Research Programs

9:45 a.m.—Activities of Chicago  
Operations Office

Panel Reports:

10:15 a.m.—Physics Review Panel

10:30 a.m.—Technical Panel on Magnetic  
Fusion of the Energy Research  
Advisory Board

10:45 a.m.—Solid Earth Sciences Panel

11:00 a.m.—Civilian Nuclear Power  
Panel

12:00 Noon—Lunch

12:45 p.m.—Plenary Session; Discussion  
of Past ERAB Reports

1:00 p.m.—Subgroup Meetings on Past  
ERAB Reports

4:20 p.m.—Public Comment (10-minute  
rule)

4:30 p.m.—Adjourn

##### August 27, 1986

9:00 a.m.—Discussion of Past ERAB  
Reports—Lessons Learned

10:00 a.m.—Discussions with Deputy  
Secretary

11:50 a.m.—Public Comment (10-minute  
rule)

12:00 Noon—Adjourn

##### August 28, 1986

9:00 a.m.—Departure Schedules

9:15 a.m.—Board Discussion of Potential  
New Topics for Study

11:50 a.m.—Public Comment (10-minute  
rule)

12:00 Noon—Adjourn

Public Participation: The meeting is open to the public. The Chairman of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Sarah Goldman at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda.

Transcripts: The transcript of the meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000

Independence Avenue SW., Washington, DC, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on July 28, 1986.

J. Robert Franklin,

Deputy Advisory Committee Management  
Officer.

[FR Doc. 86-17334 Filed 7-31-86; 8:45 am]

BILLING CODE 6450-01-M

#### Office of Hearings and Appeals

##### Notice of Cases Filed Week of July 4 Through July 11, 1986

During the Week of July 4 through July 11, 1986, the appeals and applications for exception or other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy. Submissions inadvertently omitted from earlier lists have also been included.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585.

July 25, 1986.

George B. Breznay,

Director, Office of Hearings and Appeals.

#### LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of July 4 through July 11, 1986]

Date	Name and location of applicant	Case No.	Type of Submission
March 27, 1986	Research Fuels, Inc., Dallas, TX	KEX-0017	Supplemental order. If granted: The Office of Hearings and Appeals would determine whether Oasis Petroleum Corporation's representations regarding the manner in which the firm utilized base period volumes of motor gasoline was accurate.
June 30, 1986	Aminoil/Linda Jo's Bottle Gas Company, St. Louis, MO	RR139-8	Request for modification/rescission in the Aminoil refund proceeding. If granted: The May 27, 1986 Decision and Order (Case No. RF139-84) issued to Linda Jo's Bottle Gas Company would be modified regarding the firm's application for refund submitted in the Aminoil refund proceeding.
Do	Belridge/Washington and Amoco/Washington	RM78-32 and RM21-33	Request for modification/rescission in the Belridge and Amoco second stage refund proceedings. If granted: The June 8, 1984, Decision and Order (Case Nos. RQ21-56 and RQ8-57) issued to Washington would be modified regarding the state's application for refund submitted in the Amoco and Belridge second stage refund proceedings.
July 7, 1986	Natural Resources Defense Council, Washington, D.C.	KFA-0043	Appeal of an Information Request Denial. If granted: The June 25, 1986, Freedom of Information Appeal Denial issued by the Albuquerque Operations Office would be rescinded and the Natural Resources Defense Council would receive access to the entire document entitled "Analysis of Joe-4, T-257, September 11, 1952 by Dr. Hans Bethe."
July 10, 1986	Economic Regulatory Administration, Washington, D.C.	KRS-0004	Request for stay. If granted: Economic Regulatory Administration would receive a stay of the July 28, 1985 Proposed Remedial Order (Case No. HRO-0287) issued to Goldsberry Operating Company, Inc.
Do	Petroleum Supply, Inc., Washington, D.C.	KEF-0046	Implementation of Special Refund Procedures. If granted: The Office of Hearings and Appeals would implement Special Refund Procedures pursuant to 10 C.F.R., Part 205, Subpart V in connection with May 21, 1986 Consent Order issued to Petroleum Supply, Inc.



## LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS—Continued

[Week of July 4 through July 11, 1986]

Date	Name and location of applicant	Case No.	Type of Submission
July 9, 1986	Economic Regulatory Administration, Washington, D.C.	KRS-0250	Request for stay. If granted: Economic Regulatory Administration would receive a stay of the Proposed Remedial Order issued to BHP Petroleum Company (Case No. KRO-0250) pending settlement and issuance of a consent order agreement.

Date received	Name of refund proceeding/ name of refund applicant	Case No.
7/7/86	Central/Tampa Electric Co.	RF209-2
7/7/86	Howell Quintana/Lubrizol Corp.	RF245-6
7/7/86	Husky/Nevada Power Co.	RF161-95
7/7/86	Central/Norton Center Garage	RF209-3
7/7/86	Quaker State/Bridgeport Gas	RF213-210
7/7/86	Sigmar/The Coastal Corporation	RF242-19
7/7/86	Howell/West Point Pepperell	RF245-7
7/7/86	Amoco/New Jersey	RQ251-304
7/8/86	USA/Gulf States Oil & Refining	RF252-3
6/30/86	Sage Creek Refining Co.	RF171-36
7/10/86	Gulf/Appalachian Power Company	RF40-3204
7/10/86	Quaker State/Smith-Shafer Oil Co.	RF213-211
7/10/86	Tenneco/Kelso Oil Company	RF7-137
7/9/86	Gulf/Sutton Oil	RF40-3201, RF40-3202
7/9/86	Gulf/City of Macon, Georgia	RF40-3203
7/13/86	Mobil Refund Applications	RF225-8779, RF225-8918
7/11/86	Marathon Refund Applications	RF250-46, RF250-326

[FR Doc. 86-17397 Filed 7-31-86; 8:45 am]

BILLING CODE 6450-01-M

### Notice of Issuance of Decisions and Orders; Week of June 23 through June 27, 1986

During the week of June 23 through June 27, 1986, the decisions and orders summarized below were issued with respect to applications for relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

#### Remedial Order

*United Independent Oil Co.; 6/27/86; HRO-0247*

The United Independent Oil Company (United), a refiner, objected to a Proposed Remedial Order (PRO) issued to it on July 27, 1984. The PRO required United to refund \$404,323 in alleged illegal entitlements benefits received for crude oil processed by the Lion Oil Company (Lion) in May 1977. The DOE concluded that the processing agreement transactions constituted indirect sales by United to Lion, and that the applicable regulation prohibited claims for small refiner benefits with respect to such sales. The DOE specifically found that the DOE regulation was intended to prevent small refiners from obtaining the additional entitlements benefits of the small refiner bias (SRB) through processing agreements which did not change the flow of the crude oil. Finally, the DOE rejected United's claims that

it was improper to hold it solely liable for refunding the SRB benefits and that the enforcement of these violations was barred by laches. Accordingly, the PRO was issued as a final remedial order. The overcharges and interest are to be deposited into a suitable account for ultimate distribution pursuant to Subpart V Special Refund Procedures.

#### Implementation of Special Refund Procedures

*King and King Enterprises, Inc.; 6/24/86; HEF-0108*

The DOE issued a Decision and Order implementing a plan for the distribution of \$93,907.92 received pursuant to a consent order entered into by King and King Enterprises, Inc. (K&K) and the DOE on August 31, 1981. The DOE determined that the K&K settlement fund should be distributed to customers that purchased K&K motor gasoline during the period March 1, 1979 through June 30, 1979. The specific information to be included in Applications for refund is set forth in the Decision.

#### Refund Applications

*AMTEL, Inc./Alvarado Premier Service Station; 6/25/86; RF46-51*

The DOE approved an Application for Refund filed by Alvarado Premier Service Station in connection with a consent order fund deposited by Amtel, Inc. Alvarado documented its purchase volumes of Amtel motor gasoline during the consent order period and requested a refund which was less than the \$5,000 small claims threshold amount. Based upon the procedures established in *Amtel* and the volumes of Amtel motor gasoline which Alvarado showed that it had purchased, the DOE approved a total refund amount of \$2,703, representing \$1,385 in principal and \$1,318 in interest.

*AMTEL, Inc./U.S. Oil Co., Inc.; 6/26/86; RR46-1*

The DOE issued a Decision and Order concerning a Motion for Reconsideration filed by the U.S. Oil Company (USOC) in response to an April 15, 1986 Decision and Order denying an Application for Refund filed by USOC in the *Amtel, Inc.* special refund proceeding. USOC stated that it was entitled to a refund in the *Amtel* proceeding even though it had been a spot purchaser of Amtel motor gasoline, and it submitted additional financial data to support its claim. After reviewing USOC's request, including the additional information, the DOE reaffirmed its original finding that USOC purchased motor gasoline from Amtel because it was advantageous to do so and therefore failed to overcome the presumption that, as a spot purchaser, it was not injured

by the alleged Amtel overcharges. Accordingly, the USOC Motion for Reconsideration was denied.

*Armour Oil Co./Powerine Oil Co.; 6/23/86; RF167-1*

The DOE approved an Application for Refund filed by Powerine Oil Company in connection with a consent order fund deposited by the Armour Oil Company. Powerine, a reseller of Armour petroleum products, provided documentation that it purchased refined products from Armour during the consent order period, requested a refund which was less than the \$5,000 small claims threshold amount, and was identified as an allegedly overcharged customer in the Armour audit file. In accordance with the procedures established in the Armour special refund proceeding, the DOE determined that Powerine should receive a refund based on a prorated portion of the alleged Armour overcharges. The total refund amount approved in this Decision is \$6,599.04, representing \$4,942.36 in principal and \$1,656.68 in interest.

*Charter Co. South Carolina; 6/23/86; RQ23-292*

The DOE issued a Decision approving the second-stage plan of South Carolina for use of funds from the Charter escrow account. South Carolina will use \$48,321 for two projects: a Fuel Conservation Traffic Control Program and a Distillates Weatherization Diagnostic Audit Program. The DOE found these programs restitutionary to injured consumers of petroleum products. Accordingly, the State's refund application was granted.

*Cibro Gasoline Corp./Vijax Fuels Corp.; RF184-1*

*Public Fuel Service Co., Inc.; 6/26/86; RF184-2*

The DOE issued a Decision and Order concerning two Applications for Refund filed in the Cibro Gasoline Corporation special refund proceeding. Both of the applicants were end-users of Cibro motor gasoline. In its Decision, the DOE granted the applications under the standards specified in *Champlain Oil Co.*, 13 DOE ¶ 85,119 (1985). The refund granted totals \$3,499, representing \$2,143 in principal and \$1,356 in interest.

*Coline Gasoline Corp./West Virginia, Idaho, RQ2-244; National Helium Corp./Idaho, Louisiana, RQ2-274; Standard Oil Co., RQ3-275, RQ3-262; (Indiana)/Louisiana, RQ21-263; Charter Co./Louisiana; 6/26/86; RQ23-264*

The States of West Virginia, Idaho, and Louisiana filed second-stage refund plans for funds remitted to the DOE under consent orders with Coline Gasoline Corp., National Helium Corp., Standard Oil Co. (Indiana),



and Charter Co. The OHA approved West Virginia's proposal to use \$307 plus accrued interest allotted it from the Coline escrow account to erect informational logo signs on portions of Interstate 77. The OHA also approved Idaho's proposals to use \$230 plus accrued interest from the Coline escrow account and \$5,038 plus accrued interest from the National Helium escrow account to synchronize traffic signals in three Idaho cities and to publish and distribute copies of a pamphlet on car/van-pooling. The OHA denied, however, Idaho's plans to use \$3,000 plus accrued interest to teach driver's education instructors and school bus drivers energy-efficient driving techniques. Finally, the OHA approved Louisiana's plans to use \$28,376 plus accrued interest from the National Helium escrow account and \$97,618 principal from the Standard Oil Co. escrow account to promote Louisiana Car Care Month and to implement a van-pool program in the New Orleans area. The OHA denied, however, Louisiana's application for use of Charter escrow account funds on the ground that neither of the submitted plans benefited user of No. 2-D diesel fuel. The Decision also specified the additional allocations of National Helium escrow account funds which DOE had made to eight states.

*Earth Resources Co./C & G Gas Co., RF239-2; Westate Oil Co.: 6/27/86; RF239-11*

The DOE issued a Decision and Order concerning two Applications for Refund filed by resellers of Earth Resources Company/Delta Refining Company petroleum products. Each firm applied for a refund based on the procedures outlined in *Earth Resources Co.*, 13 DOE ¶ 85,384 (1986), governing the disbursement of settlement funds received from Earth Resources pursuant to a 1981 consent order. In accordance with those procedures, each firm chose to limit its total refund eligibility to the small claims threshold amount of \$5,000 (exclusive of interest). The DOE determined that each firm should therefore receive \$7,631, representing \$5,000 in principal and \$2,631 in interest.

*General Equities, Inc./Story Brothers; 6/23/86; RF224-10*

The DOE issued a Decision and Order concerning an Application for Refund filed in the General Equities, Inc. special refund proceeding. The applicant, Story Brothers, was a reseller of General Equities motor gasoline whose purchases from General Equities during the consent order period entitled it to a refund which was less than the \$5,000 small claims threshold amount. In its Decision, the DOE granted the application under the standards specified in *Busler Enterprises*, 13 DOE ¶ 85,308 (1985). The refund granted totals \$3,040, representing \$2,817 in principal and \$223 in interest.

*Good Hope Refineries/Amoco Oil Co.: 6/23/86; RF189-8*

The DOE issued a Decision and Order concerning an Application for Refund filed by Amoco on the basis of the procedures outlined in *Good Hope Refineries*, 13 DOE ¶ 85,105 (1985). Since Amoco applied for a refund of greater than \$5,000, it was required to demonstrate that it had cost banks greater than the amount of the refund, and was

injured as a result of the overcharges. After examining the evidence and supporting documentation, the DOE concluded that Amoco had demonstrated that it had cost banks, and that it had been injured in some of the months of the consent order period. Part of Amoco's claim for a spot purchase of residual fuel, however, was denied because the firm failed to rebut the presumption that this purchase was made because it would be advantageous to Amoco. Accordingly, the firm was granted a partial refund. The total amount of refund granted is \$51,781 (including interest).

*Gulf Oil Corp./J.D. Streett & Co.: 6/27/86; RF40-2576*

The DOE issued a Decision and Order concerning an Application for Refund filed on the basis of the procedures outlined in *Gulf Oil Corp.*, 12 DOE ¶ 85,048 (1984). In accordance with these procedures, J.D. Streett & Co., Inc. demonstrated that it would not have been required to pass through to customers a cost reduction equal to the refund claimed. The firm also indicated that it had purchased motor gasoline directly from Gulf. After examining the evidence and supporting documentation, the DOE concluded that Streett should receive a refund of the full volumetric amount, or \$29,353, including interest.

*Gulf Oil Corp./Nankin Gulf Service, et al.: 6/26/86; RF40-00759 et al.*

The DOE issued a Decision and Order concerning 27 Applications for Refund filed by retailers of Gulf Oil Corporation petroleum products. Each firm applied for a refund based on the procedures outlined in *Gulf Oil Corp.*, 12 DOE ¶ 85,048 (1984), governing the disbursement of settlement funds received from Gulf pursuant to a 1978 consent order. In accordance with those procedures, each applicant demonstrated that it would not have been required to pass through to customers a cost reduction equal to the refund claimed. After examining the applications, the DOE concluded that the firms should receive a total refund of \$47,422, consisting of \$39,626 in principal plus \$7,796 in interest.

*Gulf Oil Corp./Florida Power Corp., et al.: 6/27/86; RF40-3133 et al.*

The DOE approved Applications for Refund filed by four public utilities in connection with a consent order fund deposited by the Gulf Oil Corporation. Each claimant provided documentation of its purchase volumes of Gulf products during the consent order period and certified that it would notify the appropriate regulatory agencies of any refund it received. In accordance with the procedures set forth in the Gulf special refund proceeding, the DOE granted each claimant a refund based on the volumes of Gulf products it purchased during the consent order period. The total amount of refunds approved in this decision is \$19,842, representing \$16,580 in principal and \$3,262 in interest.

*Gulf Oil Corp./R & W Oil Products: 6/23/86; RF40-1998*

The DOE issued a Decision and Order concerning an Application for Refund filed by R & W Oil Products, a retailer/wholesaler of

Gulf motor gasoline and middle distillates. R & W applied for a refund based on the volumetric presumption outlined in *Gulf Oil Corp.*, 12 DOE ¶ 85,048 (1984). R & W argued that in assessing its eligibility for a refund, its banks of unrecouped, increased product costs should include unrecouped, increased non-product costs. This argument was rejected and R & W was granted a refund for the portion of the consent order period during which it had banks of unrecovered, increased non-product costs. The refund granted consisted of \$13,293 principal and \$2,724 interest.

*Hicks Oil and Hicks Gas Co., Inc./Patterson Bros. Oil & Gas, Inc., et al.: 6/27/86; RF237-1 et al.*

The DOE issued a Decision and Order concerning six Applications for Refund filed in the Hicks Oil and Hicks Gas Company, Inc. special refund proceeding. Three of the six applicants claimed purchase volumes which entitled them to a refund which was less than the \$5,000 small claims threshold amount. The three other applicants would have been eligible to receive refunds of more than \$5,000 but elected to limit their claims to the \$5,000 threshold amount in lieu of making a detailed showing of injury. In its Decision, the DOE granted the applications under the standards specified in *Hicks Oil and Hicks Gas Co.*, 13 DOE ¶ 85,400 (1986). The refunds granted total \$25,685, representing \$19,377 in principal and \$6,308 in interest.

*Kansas-Nebraska Natural Gas Co., Inc./Mobil Oil Corp.: 6/25/86; RF113-3*

Mobil Oil Corporation filed an Application for Refund, seeking a portion of funds remitted by Kansas-Nebraska Natural Gas Company pursuant to a consent order between the firm and the DOE. Mobil documented purchases of 2,761,794 gallons of natural gas liquid products from Kansas-Nebraska during the consent order period. Through price comparisons, the DOE found that Mobil's purchases were generally priced at below market average price levels. Since there was no evidence that Mobil was unable to pass through Kansas-Nebraska's alleged overcharges, the DOE denied Mobil's refund request.

*Red Triangle Oil Co./Ted & Lil: 6/26/86; RF238-23*

The DOE issued a Decision and Order concerning an Application for Refund filed in the Red Triangle Oil Company special refund proceeding by Ted & Lil, a firm which had been identified by the Economic Regulatory Administration (ERA) as having sustained overcharges alleged in the ERA's audit of Red Triangle's sales of motor gasoline. The claimant adequately demonstrated that it was injured by the alleged overcharges and, accordingly, the DOE approved the refund application. The total amount of the refund granted in the Decision was \$836, representing \$737 in principal and \$99 in interest.

*Sid Richardson Carbon & Gasoline Co. & Richardson Products Co./Kruegels, Inc.: RF26-35;*

*Flame Gas: 6/27/86; RF26-39*



The DOE issued a Decision and Order granting refunds from the Sid Richardson Carbon & Gasoline Co. & Richardson Products Company deposit fund escrow account to two retailers of Sid Richardson propane, Kruegels, Inc. and Flame Gas. Since neither firm sought a refund for purchases exceeding the small claims threshold established for Sid Richardson applicants, the DOE did not require either to submit a detailed showing of injury. The refunds granted these firms total \$85,774, representing \$34,366 in principal and \$31,408 in interest.

#### Dismissals

The following submissions were dismissed:

Company name	Case No.
Absorbent Cotton Co.	RF225-2855
Acushnet Co.	RF225-2727; RF225-2728
Airco Industrial Gases	RF225-2872; RF225-2873
Alvin Jess	RF215-10
Anthony J. Dougherty	RF215-11
Arundel Nursery	RF215-12
Barbara P. Heavens	RF225-2862
Barry E. Christy	RF215-15
Bernie S. Kahn, Inc.	RF225-3189
Biddle Gulf	RF40-3175
Bothwell Ranches	RF225-8192
Brookway Glass Inc.	RF225-3089; RF225-3090
C. Floyd Caldwell	RF225-3210
Central Marine Service, Inc.	RF225-2707; RF225-2708
Dallas Country Club	RF225-2112; RF225-3113
Daniels Gulf	RF40-3183
Fannie Lee Mitchell	RF225-2723; RF225-2738
Forest Foods Inc.	RF225-2465; RF225-2466
Forty West Gulf	RF40-3176
Glidden Coating & Resins	RF225-2848
Howard Bus Co.	RF215-16
Hunter Fan Co.	RF225-2865; RF225-2866
Isle Oil Co.	KEE0055
Johns Hopkins University	RF215-13
Label Craft Co.	RF225-2789; RF225-2790
Lester S. Sanderson	RF225-2720; RF225-2721
Locust Valley Fire District	RF225-3002
Loren D. Hazen, Jr.	RF187-12
Lubricup-Houdaille, Inc.	RF225-2638
Marimac Paper Co.	RF225-2452; RF225-2453
Newman Oil Co., Inc.	KEE0057
Sabaton Chrysler	RF213-140
Sowela Technical Institute	RF225-2705; RF225-2706
Superior Burner Service, Inc.	RF21-12617
Texaco, Inc.	HRO0274
The Grigoleit Co.	RF225-3211
United Technologies Automotive Group	RF225-2863
W.W. Babcock Co., Inc.	RF225-2860
Waller Avenue Gulf	RF40-3167
Woodstream Corp.	RF225-3213

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E-234, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy*

*Guidelines*, a commercially published loose leaf reporter system.

George B. Breznay,

Director Office of Hearings and Appeals.

July 17, 1986.

[FR Doc. 86-17398 Filed 7-31-86; 8:45 am]

BILLING CODE 6450-01-M

#### Notice of Issuance of Decisions and Orders; Week of June 30 Through July 4, 1986

During the week of June 30 through July 4, 1986, the decisions and orders summarized below were issued with respect to appeals and applications for exception or other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

#### Appeal

H. Michael Clyde, 7/3/86, KFA-0038

On June 6, 1986, H. Michael Clyde (Clyde) filed a Freedom of Information Act (FOIA) Appeal from a determination issued by the Inspector General (IG) of the Department of Energy on May 5, 1986. The determination, which was issued in response to a request for documents made by Clyde under the FOIA, withheld certain documents and portions of documents pursuant to Exemptions 5, 6, and 7(C). In considering the Appeal, the DOE found that the IG's determination had been made in full compliance with the FOIA and the DOE's implementing regulations. Specifically, the DOE found that material had been properly withheld pursuant to Exemption 5 based on the deliberative process privilege, and while not claimed by the IG, that some of the material also was entitled to protection under the exemption based on the attorney work-product privilege. In addition, contrary to Clyde's assertions that no privacy interest would be invaded by release of the material withheld pursuant to Exemptions 6 and 7(C), the DOE found in each case that release of the withheld material would constitute any unwarranted invasion of privacy not outweighed by an public interest in disclosure. Accordingly, the DOE denied Clyde's Appeal.

#### Request for Temporary Exception

Whirlpool Corporation, 7/2/86, KEL-0002; KEL-0037

Whirlpool Corporation filed Applications for Temporary Exception seeking relief from the provisions of 10 CFR Subchapter D, Part 430, Subpart B, Appendix A1 (Appendix A1) for two models of adaptively-defrosting refrigerator-freezer. Appendix A1 prescribes refrigerator and refrigerator-freezer energy test procedures, the results of which must be included on a label or tag to be affixed to an appliance before it may be sold. In considering Whirlpool's request, the DOE found that adherence to the Appendix A1 procedures would cause a greater inequity for Whirlpool than for the other persons affected

by this proceeding, since in the absence of relief, Whirlpool would not be able to report energy usage figures. The firm was granted temporary exception relief allowing it to test the two new refrigerator-freezers using the Appendix A1 procedures for long-time automatic defrost machines and an assumed CT of 36.

#### Refund Applications

Aminoil U.S.A., Inc./Cities Service Oil and Gas Company, 7/3/86, RF139-10

Cities Service Oil and Gas Corporation (Cities) filed an Application for Refund in which the firm sought a portion of the fund obtained by the DOE through a consent order with Aminoil U.S.A., Inc. (Aminoil). Although the firm was given the opportunity to rebut the spot purchaser presumption and establish its injury, the DOE determined that Cities failed to provide evidence that it sustained an injury from its Aminoil purchases. Accordingly, the DOE concluded that Cities' sporadic purchases from Aminoil were "spot" purchases which did not reflect a regular supplier/purchaser relationship, and Cities' Application for Refund was denied.

Bayou State Oil Company, Ida Gasoline, Inc., E-Z Mart Stores, Inc., 6/30/86, RR117-1

The DOE issued a Decision and Order concerning a Request for Reconsideration of an Application for Refund filed by E-Z Mart Stores, Inc. on the basis of the procedures outlined in *Bayou State Oil Co.*, 12 DOE ¶ 85,197 (1985). E-Z Mart had requested a refund which exceeded the \$5,000 small claims limit established in *Bayou State*. In order to receive such a refund E-Z Mart had to demonstrate that it had cost banks which exceeded the amount of the estimated refund, and that it was injured as a result of the overcharges. Upon reconsideration, the DOE concluded that E-Z Mart Stores had demonstrated that it had cost banks greater than the amount of the refund requested. The DOE further determined that E-Z Mart was unable to pass through its increased costs in many of the months of the Consent Order period. Accordingly, it received an additional refund of \$171,235, including interest.

Eastern Petroleum Corporation/B-60 Ranch, 6/30/86, RF215-14

The DOE issued a Decision and Order concerning an Application for Refund filed in the Eastern Petroleum Corporation special refund proceeding. The applicant, B-60 Ranch, was an end-user of motor gasoline purchased from Eastern during the consent order period. In its Decision, the DOE granted the application under the standards specified in *Busler Enterprises, Inc.*, 13 DOE ¶ 85,308 (1985). The refund granted in this proceeding totals \$19, representing \$14 in principal and \$5 in interest.

Gulf Oil Corporation/G.A. Norris Butane Company, Callaway Butane Company, 7/2/86, RF40-3103, RF40-3106

G.A. Norris Butane Company and Callaway Butane Company filed Applications for Refund seeking portions of the funds obtained by the DOE through a Consent Order with Gulf Oil Corporation. In a July 2, 1986 Decision, the DOE denied the firms'



Applications for Refund because Norris and Callaway admittedly did not have access to information that would allow them to demonstrate the existence of cost banks equal to the refunds claimed. Since Gulf applicants were required to demonstrate the existence of cost banks, the firms were found to be ineligible to receive refunds.

*Gulf Oil Corporation/Hoff Oil Company, et al., 6/30/86, RF40-782, et al.*

The DOE issued a Decision and Order granting the Applications for Refund filed by Hoff Oil Company and three other retailers or wholesalers of Gulf Oil Corporation petroleum products. All of the claimants applied for refunds based on the volumetric presumption outlined in *Gulf Oil Corp.*, 12 DOE ¶ 85,048 (1984). The refunds approved in this Decision total \$39,465, representing \$32,753 in principal and \$6,712 in interest.

*Gulf Oil Corporation/Reynolds Gulf Service, Inc., et al., 7/2/86, RF40-00215, et al.*

The DOE issued a Decision granting 12 Applications for Refund from the Gulf Oil Corporation consent order fund filed by retailers of Gulf refined products. In considering the applications, the DOE found that each of the claimants had demonstrated that it would not have been required to pass through to its customers a cost reduction equal to the refund claimed. Accordingly, the firms were granted refunds totalling \$13,309, representing \$11,047 in principal and \$2,262 in interest.

*Gulf Oil Corporation, Sutton Oil Company, et al., 7/1/86, RF40-931 et al.*

The DOE issued a Decision and Order concerning the Applications for Refund filed by Sutton Oil Company and 4 other consignees of Gulf motor gasoline, on the basis of the procedures outlined in *Gulf Oil Corp.*, 12 DOE ¶ 85,048 (1984). Each applicant demonstrated that overall gasoline consumption in the state in which it was located and increased during the consent order period, while its own total sales volume of gasoline during that period had declined. The DOE therefore determined that each applicant was injured by Gulf's allegedly uncompetitive prices. Each applicant's refund was calculated by multiplying the number of gallons of gasoline Gulf consigned to it during the consent order period, its percent loss of potential sales, and the Gulf volumetric refund amount of \$.00122. The total refund granted in this Decision is \$10,284, representing \$8,536 in principal and \$1,748 in interest.

*Leonard E. Belcher, Inc./East Springfield Oil Company, et al., 7/1/86, RF227-13 et al.*

The DOE issued a Decision and Order concerning five Applications for Refund filed on the basis of the procedures outlined in *Leonard E. Belcher, Inc.*, 13 DOE ¶ 85,348 (1986). Four of the firms applied for refunds of greater than \$5,000, and were required to demonstrate that they had cost banks greater than the amount of the refund, and that they were injured as a result of the overcharges. After examining the evidence and supporting documentation, the DOE concluded that three of the firms had demonstrated that they had cost banks, and had been injured in many of the months of the consent order period.

Accordingly, these firms were granted refunds for the months that they suffered injury. The fourth firm could not demonstrate that it had experienced injury in excess of the threshold amount, so its refund was limited to \$5,000 plus interest. The fifth applicant did not attempt to prove injury, but instead agreed to limit its claim to \$5,000. The total amount of the refunds granted in this decision is \$54,704, including interest.

*Pronto Gas Company/Warren Petroleum Company, E.I. du Pont de Nemours & Co., 7/3/86, RF59-1, RF59-2*

Warren Petroleum Company filed an Application for Refund, seeking a portion of funds remitted by Pronto Gas Company pursuant to a consent order Pronto entered into with the DOE. Warren purchased 3,043,716 gallons of natural gas liquid products from Pronto during the consent order period. The DOE found that for a major portion of the NGLPs that Warren purchased, Warren was charged prices below the market average price levels. As a result, Warren obtained a substantial cost benefit.

Considering the competitive advantage that Warren enjoyed from its purchases from Pronto, the DOE limited the refund to Warren to an amount equal to the number of gallons that Warren purchased at above market prices multiplied by the per gallon refund rate. The total amount of refund granted to Warren was \$13,386.00, representing \$7,101.26 in principal and \$6,284.74 in accrued interest.

E.I. du Pont de Nemours & Co. also filed an application for Refund in the Pronto refund proceeding on the basis that it purchased the Pronto products from Warren. Du Pont used the Pronto products in its petrochemical production process. Since Du Pont was an end-user, the DOE determined that the firm should receive a refund in proportion to the volume that the firm purchased without a detailed showing of injury. The amount of refund granted to Du Pont was \$837.00, representing \$443.96 in principal and \$393.04 in accrued interest.

*Sid Richardson Carbon and Gasoline Company and Richardson Products Company/Licht Brothers Oil Company, Inc., G.A. Eddy & Sons, Inc., 7/1/86, RF26-40, RF26-41*

The DOE issued a Decision and Order granting refunds from the Sid Richardson Carbon & Gasoline Company and Richardson Product Company deposit escrow account to two retailers of Sid Richardson propane, Licht Brothers Oil Company, Inc. and G.A. Eddy & Sons, Inc. Neither firm sought a refund for purchases exceeding the small claims threshold amount established for Sid Richardson applicants. The refunds granted these firms total \$18,035, representing \$9,423 in principal and \$8,612 in interest.

#### Dismissals

The following submissions were dismissed:  
*Company Name and Case No.*

Automatic Gasoline Systems, Inc., RF167-7  
Carleton Oil Company, Inc., KEE-0048  
Illinois Power Company, RF21-12620  
Pelmont Enterprises Inc., RF225-687

Copies of the full text of these decisions and orders are available in the

Public Reference Room of the Office of Hearings and Appeals, Room 1E-234, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines*, a commercially published loose leaf reporter system.

**George B. Breznay,**  
*Director, Office of Hearings and Appeals.*  
July 17, 1986.

[FR Doc. 86-17399 Filed 7-31-86; 8:45 am]

BILLING CODE 6450-01-M

#### Implementation of Special Refund Procedures

**AGENCY:** Office of Hearings and Appeals, Department of Energy.

**ACTION:** Notice of implementation of special refund procedures.

**SUMMARY:** The Office of Hearings and Appeals of the Department of Energy solicits comments concerning the appropriate procedures to be followed in refunding to adversely affected parties \$21,217 obtained as a result of a consent order which the DOE entered into with National Propane Corporation, Conservative Gas Division, a reseller-retailer of propane located in New Hyde Park, New York. The money is being held in escrow following the settlement of enforcement proceedings brought by the DOE's Economic Regulatory Administration.

**DATE AND ADDRESS:** Comments must be filed within 30 days of publication of this notice in the *Federal Register* and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. All comments should conspicuously display a reference to case number HEF-0135.

**FOR FURTHER INFORMATION CONTACT:** Sharon Dennis, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585 (202) 252-6602.

**SUPPLEMENTARY INFORMATION:** In accordance with § 205.282(b) of the procedural regulations of the Department of Energy, 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision sets forth procedures and standards that the DOE has tentatively formulated to distribute to adversely affected parties \$21,217, plus accrued interest, obtained by the DOE under the terms of a consent order entered into



with National Propane Corporation, Conservative Gas Division (Conservative). The funds were provided to the DOE by Conservative to settle all claims and disputes between the firm and the DOE regarding the manner in which the firm applied the federal price regulations with respect to its sales of propane during the period November 1, 1973, through November 30, 1975.

OHA proposes that a two-stage refund process be followed. In the first stage, OHA has tentatively determined that a portion of the consent order funds should be distributed to firms and individuals who purchased propane from Conservative. In order to obtain a refund, a claimant will be required to submit a schedule of its monthly purchases from Conservative and to demonstrate that it was injured by Conservative's pricing practices. Applicants must submit specific information regarding the date, place, and volume of product purchased, whether the increased costs were absorbed by the claimant or passed through to other purchasers, and the extent of any injury alleged to have been suffered. An applicant claiming \$5,000 or less, however, will be required to document only its purchase volumes.

Applications for refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Some residual funds may remain after all meritorious first-stage claims have been satisfied. OHA invites interested parties to submit their views concerning alternative methods of distributing any remaining funds in a subsequent proceeding.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of publication of this notice. All comments received in these proceedings will be available for public inspection between 1:00 and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000 Independence Avenue, SW., Washington, DC 20585.

Dated: July 24, 1986.

George B. Brezany,  
Director, Office of Hearings and Appeals.  
July 24, 1986.

### Proposed Decision and Order of the Department of Energy; Implementation of Special Refund Procedures

Name of Firm: National Propane Corporation, Conservative Gas Division

Date of Filing: October 13, 1983  
Case Number: HEF-0135.

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special procedures to distribute funds received as a result of an enforcement proceeding in order to remedy the effects of actual or alleged violations of the DOE regulations. See 10 CFR Part 205, Subpart V. In accordance with the provisions of Subpart V, on October 13, 1983, ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a consent order entered into with National Propane Corporation, Conservative Gas Division (Conservative).

#### I. Background

Conservative is a "reseller-retailer" of covered products as that term was defined in 10 CFR § 212.31, with its home office located in New Hyde Park, New York. A DOE audit of Conservative's records revealed possible violations of the Mandatory Petroleum Price Regulations, 10 CFR Part 212, Subpart F. The audit alleged that between November 1, 1973 and November 30, 1975, Conservative committed certain pricing violations in its sales of propane.

In order to settle all claims and disputes between Conservative and the DOE regarding the firm's sales of propane during the period covered by the audit, Conservative and the DOE entered into a consent order on September 26, 1979. The consent order refers to ERA's allegations of overcharges, but notes that there was no finding that violations occurred. In addition, the consent order states that Conservative does not admit that it violated the regulations and that the settlement is solely a compromise of reasonable differing interpretations of rules and regulations governing the computation of Conservative's maximum lawful selling price (MLSP).

Under the terms of the consent order, Conservative agreed to pay a total settlement amount of \$70,491, including interest, to cover alleged overcharges committed in its sales of propane during the consent order period. ERA ordered

that the total settlement amount be divided between Conservative's various customer classes and be distributed by two different methods. Apparently Conservative marketed its propane in cylinder and bulk form to ten separate customer categories at wholesale and retail prices.<sup>1</sup> In connection with this settlement, all of Conservative's retail and certain of its wholesale customers received direct payments totaling \$49,274. The remaining \$21,217 represents the settlement of alleged overcharges on sales to Conservative's wholesale customers that were not included in the direct-payment schedule. Conservative deposited that amount into an interest-bearing escrow account for ultimate distribution by the DOE.

The purchasers eligible for refunds in this proceeding are resellers which purchased bulk and cylinder propane, and wholesale dealers which purchased "bulk cylinder" propane from Conservative. In view of the direct payments which have been made to all retail and certain wholesale customers, we propose that such purchasers be ineligible to claim refunds in this proceeding. A further payment to these firms on the basis of the sales covered by the audit would produce a double refund.<sup>2</sup> This decision therefore concerns the distribution of the funds in the Conservative escrow account to these eligible classes of purchasers.<sup>3</sup>

#### II. Proposed Refund Procedures

The procedural regulations of the DOE set forth general guidelines which may be used by OHA in formulating and implementing a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations where the DOE is unable to readily identify those persons who may have been injured by any alleged overcharges or ascertain the amount of such injuries. For a more detailed discussion of Subpart V and the authority of OHA to fashion procedures

<sup>1</sup> Bulk sales are generally delivered by tank truck in large quantities at relatively low cost, as compared to cylinder sales which are more expensive because they include the costs of bottling propane in cylinder form.

<sup>2</sup> If, however, a wholesale customer can show that it was also a purchaser of the propane sales covered in this proceeding, and that it did not previously receive a refund for such purchases, then that customer may apply for a refund on those purchases.

<sup>3</sup> As of June 30, 1986, the Conservative escrow account contained a total of \$40,916.82, representing \$21,217 in principal and \$19,699.82 in accrued interest.



to distribute refunds, see *Office of Enforcement*, 9 DOE ¶ 82,508 (1981), and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981) (*Vickers*).

As in other Subpart V cases, we believe that the distribution of refunds in this proceeding should take place in two stages. In the first stage, we will attempt to provide refunds to identifiable purchasers of propane that were injured by Conservative's alleged pricing practices between November 1, 1973 and November 30, 1975 (the consent order period). Any funds that remain after all meritorious first-stage claims have been paid may be distributed in a second-stage proceeding. See, e.g., *Office of Special Counsel*, 10 DOE ¶ 85,048 (1982) (*Amoco*).

#### A. Refunds to Identifiable Purchasers

In the first stage of the Conservative refund proceeding, we propose to distribute the funds currently in escrow to claimants who demonstrate that they were injured by Conservative's alleged overcharges. As in many prior refund cases, we propose to adopt certain presumptions which will be used to help determine the level of a purchaser's injury.

The use of presumptions in refund cases is specifically authorized by applicable DOE procedural regulations. Section 205.282(e) of those regulations states that:

[I]n establishing standards and procedures for implementing refund distributions, the Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

10 CFR 205.282(e). The presumptions we plan to adopt in this case are used to permit claimants to participate in the refund process without incurring inordinate expenses and will enable OHA to consider the refund applications in the most efficient way possible in view of the limited resources available. First, we plan to adopt a volumetric presumption for the allocation of consent order funds. Second, we propose to adopt a presumption of injury with respect to small claims. Third, we plan to adopt a presumption that spot purchasers were not injured by the alleged overcharges. As a separate matter, we are making a proposed finding that end users experienced injury.<sup>4</sup>

<sup>4</sup> We note that the escrow funds at issue in this proceeding were assigned to wholesale purchasers

The pro rata, or volumetric, refund presumption assumes that alleged overcharges by a consent order firm were spread equally over all gallons of products marketed by that firm. In the absence of better information, the volumetric method is sound because the DOE price regulations generally required a regulated firm to account for increased costs on a firm-wide basis in determining its prices.

Using a volumetric approach means that a portion of the consent order funds would be allocated to each gallon of product which a successful claimant purchased from Conservative. The volumetric factor is the average per gallon refund and in this case equals \$0.002491 per gallon.<sup>5</sup> In addition, successful claimants will receive a proportionate share of the accrued interest.

The volumetric presumption is rebuttable, however. A claimant which believes that it suffered a disproportionate share of the alleged overcharges may submit evidence proving this claim in order to receive a larger refund. See *Sid Richardson Cabron and Gasoline Co. and Richardson Products Co./Siouxland Propane Co.*, 12 DOE ¶ 85,054 (1984), and case cited therein at 88,164.

Second, we plan to presume that purchasers of Conservative's products seeking small refunds were injured by Conservative's pricing practices. There are a number of bases for the presumption that claimants seeking small refunds were injured.

See, e.g., *Urban Oil Co.*, 9 DOE ¶ 82,541 (1982). The firms that will be eligible for refunds are purchasers that were in the chain of distribution of the products to which the alleged overcharges attached. These purchasers therefore experienced some impact of the alleged overcharges. Without some presumptions as to injury, in order to support a specific claim of injury a claimant would have to compile and submit very detailed factual information regarding the impact of alleged overcharges which occurred many years ago. This demonstration, if even possible, would generally be very time-consuming and expensive. In the case of relatively small claims, the cost to the claimant of gathering the necessary information and the cost to OHA of analyzing it could certainly

only. However, as in other proceedings, downstream customers—which may include end users—may be eligible for refunds on purchases made from Conservative.

<sup>5</sup> The volumetric factor has been calculated from information contained in ERA's audit workpapers. The figure was derived by dividing the \$21,217 in escrow by 8,516,162 gallons sold by Conservative during the consent order period.

exceed the value of any expected refund as well as any analytic benefits to be derived. Consequently, without simplified procedures, some potential claimants could be effectively denied an opportunity to seek a refund since it would be uneconomical to do so. As a result, we intend to adopt a small claims presumption which will eliminate the need for a claimant to submit and OHA to analyze extensive, detailed proof of the result of the impact of the alleged overcharges.

Under the small-claims presumption, a claimant that is a reseller or retailer will not be required to submit any additional evidence of injury beyond purchase volumes if its refund claim is based on purchases below a certain level. Principal among the factors which determine the value of this threshold is the concern that the cost to the applicant and the government of compiling and analyzing information sufficient to show injury not exceed the amount of the refund to be gained. In this case, where the refund amount is fairly low, \$5,000 is a reasonable value for the small-claim threshold. See *Texas Oil & Gas Corp.*, 12 DOE ¶ 85,069 at 88,210 (1984); *Office of Special Counsel*, 11 DOE ¶ 85,226 (1984) (*Conoco*), and cases cited therein.

A reseller or retailer which seeks a refund of more than \$5,000 will be required to document its claim. While there are a variety of methods by which a claimant could show that it did not pass the alleged overcharges on to its customers, the claimant would generally have to show that at the time of the alleged overcharges, it maintained a bank of unrecovered costs,<sup>6</sup> and that market conditions would not permit it to pass through those increased costs.<sup>7</sup>

If a reseller or retailer made only spot purchases, we propose that it should not receive a refund since it is unlikely to have experienced injury. This is true because

<sup>6</sup> If a firm states that it did not maintain cost banks during the relevant period, we plan to presume that it was able to pass through its increased costs unless it presents an alternative demonstration of cost-absorption. For instance, we would generally require evidence of the firm's May 15, 1973 maximum lawful margin(s), as well as the actual monthly margins it maintained during the consent order period through January 27, 1981 (when deregulation of propane occurred).

<sup>7</sup> Resellers or retailers who claim a refund in excess of \$5,000 but who cannot establish that they did not pass through the price increases will be eligible for a refund of up to the \$5,000 threshold, without being required to submit further evidence of injury. Firms potentially eligible for greater refunds may choose to limit their claims to \$5,000. See *Vickers*, 8 DOE at 85,396. See also *Office of Enforcement*, 10 DOE ¶ 85,029 at 88,122 (1982) (*Ada*).



[T]hose customers tend to have considerable discretion in where and when to make purchases and would therefore not have made spot market purchases of [the firm's product] at increased prices unless they were able to pass through the full amount of [the firm's] quoted selling price at the time of purchase to their own customers.

*Vickers*, 8 DOE at 85,396-97. The same principles apply in this case. Accordingly, we propose that resellers and retailers which made only spot purchases from Conservative not receive refunds unless they present evidence which rebuts this presumption and establishes the extent to which they experienced injury.

As noted above, we are making a proposed finding that end users whose business operations are unrelated to the petroleum industry were injured by the alleged overcharges. These entities were not subject to DOE regulations during the relevant period, and are thus outside our inquiry about pass-through of overcharges. See *Office of Enforcement*, 10 DOE ¶ 85,072 (1983) (*PVM*); see also *Texas Oil & Gas Corp.*, 12 DOE at 88,209, and cases cited therein. Therefore, we propose that for end users of propane sold by Conservative, documentation of purchase volumes will provide a sufficient showing of injury.

In addition, we propose that firms whose prices for goods and services are regulated by a governmental agency or by the terms of a cooperative agreement not be required to provide a detailed demonstration that they absorbed the alleged overcharges associated with Conservative's sales of propane. See, e.g., *Office of Special Counsel*, 9 DOE ¶ 82,538 (1982) (*Tenneco*), and *Office of Special Counsel*, 9 DOE ¶ 82,545 at 85,244 (1982) (*Pennzoil*). We will require such applicants to certify that they will pass any refund received through to their customers, to provide us with a full explanation of how they plan to accomplish this restitution, and to notify the appropriate regulatory body or membership group of their receipt of any refund money. Sales by cooperatives to nonmembers, however, will be treated the same as sales by any other reseller.

As in previous cases, only claims for at least \$15 plus interest will be processed. In prior refund cases we have found that the cost of processing claims for smaller amounts outweighs the benefits of restitution. See, e.g., *Urban Oil Co.*, 9 DOE at 85,225. See also 10 CFR 205.286(b). The same principle applies here.

### III. Applications for Refund

In order to receive a refund, each claimant will be required to identify its purchasing status during the relevant

period and to submit a schedule of its monthly purchases of propane from Conservative. If an applicant claims injury at a level greater than the threshold level, it must document this injury in accordance with the procedures described above, including specific information as to the volume and per gallon price of propane purchased, the date of purchase, and the extent of any injury alleged. A claimant must also indicate whether it has previously received a refund from Conservative, or from any source, with respect to the alleged overcharges identified in the ERA audit underlying this proceeding. Each applicant must also state whether there has been a change in ownership of the firm since the audit period. If there has been a change in ownership, the applicant must provide the means and addresses of the other owners, and should either state the reasons why the refund should be paid to the applicant rather than to the other owners or provided a signed statement from the other owners indicating that they do not claim a refund. Finally, an applicant should report whether it is or has been involved as a party in any DOE enforcement or private § 210 actions. If these actions have been concluded the applicant should furnish a copy of any final order issued in the matter. If the action is still in progress, the applicant should briefly describe the action and its current status. The applicant must keep OHA informed of any change in status while its Application for Refund is pending. See 10 CFR 205.9(d).

In the event that money remains after all meritorious claims have been satisfied, residual funds could be distributed in a number of ways in a subsequent proceeding. However, we will not be in a position to decide what should be done with any remaining funds until the initial stage of this refund proceeding has been completed. We encourage the submission by interested parties of proposals which address alternative methods of distributing any remaining funds.

#### It Is Therefore Ordered That:

The refund amount remitted to the Department of Energy by National Propane Corporation, Conservative Gas Division pursuant to the Consent Order executed on September 26, 1979, will be distributed in accordance with the foregoing Decision.

[FR Doc. 86-17402 Filed 7-31-86; 8:45 am]

BILLING CODE 6450-01-M

### Implementation of Special Refund Procedures

**AGENCY:** Office of Hearings and Appeals, Department of Energy.

**ACTION:** Notice of Implementation of Special Refund Procedures.

**SUMMARY:** The Office of Hearings and Appeals of the Department of Energy announces the procedures for disbursement of \$216,196.10 obtained as a result of a consent order which the DOE entered into with Marine Petroleum Company and Mars Oil Company, their parents, subsidiaries and affiliates (Marine), a reseller-retailer of refined petroleum products located in St. Louis, Missouri. The money is being held in escrow following the settlement of enforcement proceedings brought by the DOE's Economic Regulatory Administration.

**DATE AND ADDRESSES:** Applications for Refund of a portion of the Marine consent order funds must be filed in duplicate and must be received within 90 days of publication of this notice in the *Federal Register*. All applications should refer to Case No. HEF-0122 and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585.

**FOR FURTHER INFORMATION CONTACT:** Sharon Dennis, Office of Hearings and Appeals, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 252-6602.

**SUPPLEMENTARY INFORMATION:** In accordance with § 205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out below. The Decision relates to a consent order entered into by the DOE and Marine Petroleum Company and Mars Oil Company which settled possible pricing violations in Marine's sales of motor gasoline during the period November 1, 1973, through April 30, 1974. A Proposed Decision and Order tentatively establishing refund procedures and soliciting comments from the public concerning the distribution of the Marine consent order funds was issued on December 23, 1985. 50 Fed. Reg. 53390 (December 31, 1985).

The Decision sets forth procedures and standards that the DOE has formulated to distribute to adversely affected parties \$216,196.10 plus accrued interest, obtained by the DOE under the terms of a consent order entered into with Marine Petroleum Company and Mars Oil Company, their parents, subsidiaries, and affiliates (Marine).



OHA proposes that a two-stage refund process be followed. In the first stage, OHA has tentatively determined that a portion of the consent order funds should be distributed to 50 first purchasers who may have been overcharged. In order to obtain a refund, each claimant will be required either to submit a schedule of its monthly purchases from Marine or to submit a statement verifying that it purchased motor gasoline from Marine and is willing to rely on the data in the audit files. Reseller and retailer applicants will be required to document their injury as discussed in the Decision, although a detailed demonstration of injury will not be required of applicants that file at or below the \$5,000 threshold level. End-user customers are presumed to have been injured and need only document their total purchases from Marine to provide sufficient evidence of injury. In addition, applications for refund will be accepted from purchasers not identified by the DOE audit, including customers of Marine's company-affiliated wholesale and retail firms. Unidentified customers who purchased directly from Marine will be required to provide schedules of their monthly purchase volumes. These applicants will be subject to the same requirements regarding proof of injury as are identified purchasers. Motorists which purchased from Marine's retail stations, like other ultimate consumers, had no opportunity to pass through the alleged overcharges and consequently do not have to provide a detailed demonstration of injury.

As the Decision and Order published with this Notice indicates, Applications for Refund may now be filed by customers who purchased motor gasoline from Marine during the consent order period. Applications will be accepted provided they are filed in duplicate and received no later than 90 days after the publication of this Decision and Order in the *Federal Register*. The specific information required in an Application for Refund is set forth in the Decision and Order.

Dated: July 23, 1986.

George B. Breznay,  
Director Office of Hearings and Appeals.  
July 23, 1986.

#### Decision and Order of the Department of Energy; Implementation of Special Refund Procedures

Name of Firm: Marine Petroleum Company and Mars Oil Company  
Date of Filing: October 13, 1983  
Case Number: HEF-0122

Under the procedural regulations of the Department of Energy (DOE), the

Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special procedures to distribute funds received as a result of an enforcement proceeding in order to remedy the effects of actual or alleged violations of the DOE regulations. See 10 CFR Part 205, Subpart V. In accordance with the provisions of Subpart V, on October 13, 1983, ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a consent order entered into with Marine Petroleum Company, Mars Oil Company, their parents, subsidiaries and affiliates (Marine).

#### I. Background

Marine is a "reseller-retailer" of refined petroleum products as that term was defined in 10 CFR 212.31 and is located in St. Louis, Missouri. A DOE audit of Marine's records revealed possible violations of the Mandatory Petroleum Price Regulations, 10 CFR Part 212, Subpart F. Based on the audit, the DOE alleged that between November 1, 1973 and April 30, 1974, Marine committed certain pricing violations with respect to its sales of motor gasoline.

In order to settle all claims and disputes between Marine and the DOE regarding the firm's sales of motor gasoline during the period covered by the audit, Marine and the DOE entered into a consent order on September 1, 1981. The consent order, which resolved a Notice of Probable Violation (NOPV) issued on November 26, 1980, refers to ERA's allegations of overcharges, but notes that there was no finding that violations occurred. In addition, the consent order states that Marine does not admit that it violated the regulations.

Under the terms of the consent order, Marine agreed to deposit \$198,500 plus installment interest, into an interest-bearing escrow account for ultimate distribution by the DOE. Marine was required to make its payments in 24 equal monthly installments. The consent order was paid in full on June 18, 1982. Including installment interest, Marine's actual deposits total \$216,196.10. That sum will be considered to be the principal amount in this proceeding. This decision concerns the distribution of the funds in the Marine escrow account.<sup>1</sup>

<sup>1</sup> As of May 31, 1986, the Marine escrow account contained a total of \$316,948.62, representing \$216,196.10 in principal (including installment interest) and \$100,752.52 in accrued interest.

#### II. Jurisdiction and Authority to Fashion Refund Procedures

The general guidelines which the OHA may use to formulate and implement a plan to distribute funds received as the result of a consent order are set forth in 10 CFR Part 205, Subpart V. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds obtained as part of settlement agreements, see *Office of Enforcement*, 9 DOE ¶ 82,508 (1981), and *Office of Enforcement*, 9 DOE ¶ 82,597 (1981).

On December 23, 1985, the OHA issued a Proposed Decision and Order (PD&O) setting forth a tentative plan for the distribution of refunds to parties that can make a reasonable showing of injury as a result of Marine's alleged violations in its sales of motor gasoline during the consent order period. 50 FR 53,390 (December 31, 1985). The PD&O stated that the basic purpose of a special refund proceeding is to make restitution for injuries that were experienced as a result of actual or alleged violations of the DOE regulations.

In order to give notice to all potentially affected parties, a copy of the Proposed Decision was published in the *Federal Register* and comments regarding the proposed refund procedures were solicited. In addition, a copy of the PD&O was mailed to each purchaser identified in the audit file whose address was available. Copies were also sent to various petroleum marketers' associations. None of Marine's customers submitted comments on the proposed procedures. Comments were submitted collectively on behalf of the States of Arkansas, Delaware, Iowa, Louisiana, North Dakota, Rhode Island, and West Virginia. These comments concern the distribution of any funds remaining after all refunds have been made to injured parties. However, the purpose of this Decision is to establish procedures for filing and processing claims in the first stage of the Marine refund proceeding. Any procedures pertaining to the disposition of any monies remaining after this first stage will necessarily depend on the size of the fund. See *Office of Enforcement*, 9 DOE ¶ 82,508 (1981). Therefore, we will not address the issues raised by the states at this time.

#### A. Refunds to Identified Purchasers

In the first stage of the Marine refund proceeding, we will distribute the funds currently in escrow to claimants that demonstrate that they were injured by



the alleged overcharges. In order to be eligible to receive a refund, claimants will have to file an application and, with three exceptions which will be discussed later in this Decision, show the extent to which they were injured by the alleged overcharges.

In order to effect restitution in this proceeding, we will rely on the information contained in the DOE's audit files. The purchasers of Marine's products are identified in the audit file. See, e.g., *Marion Corp.*, 12 DOE ¶ 85,014 (1984) (*Marion*). Under these circumstances, a reasonably precise determination can be made regarding the identity of the allegedly overcharged parties and the amount of alleged overcharges each party experienced.

In the PD&O we stated that during the DOE audit, 50 first purchasers were identified by ERA and alleged overcharge amounts were assigned. The audit also indicated that these identifiable wholesale purchasers absorbed 47.05 percent of the total alleged overcharges. The remainder of the overcharges were assigned to Marine's company-affiliated wholesale firms and retail firms, which absorbed 17.36 percent and 35.59 percent of the alleged overcharges, respectively. However, these affiliates (see Appendix III) are not eligible for refunds since such a refund would amount to returning consent order funds to Marine. However, customers of these wholesale and retail affiliates are eligible to apply for refunds from the portion of the settlement funds assigned to the affiliate firms by ERA. The record indicates that these identified first purchasers and repurchasers are the parties most likely to have been injured by Marine's pricing practices. We recognize, however, that other wholesale customers not identified by the ERA audit may have been overcharged by Marine during the consent order period, and may be entitled to a portion of the consent order fund. Therefore, as in previous cases of this type, the funds in the escrow account may be apportioned among (i) The purchasers identified by the audit, (ii) other injured first purchasers, and (iii) subsequent repurchasers that can also show injury. See, e.g., *Bob's Oil Co.*, 12 DOE ¶ 85,024 (1984); *Richards Oil Company*, 12 DOE ¶ 85,150 (1984). The first purchasers identified by the audit and the share of the settlement earmarked for each are listed in Appendices 1 and 2.<sup>2</sup>

<sup>2</sup> Appendix 1 contains the names and addresses of identified first purchasers; Appendix 2 contains the names and last known addresses of additional identified first purchasers for which we have no current addresses.

On the basis of the information in the record at this time, we will distribute a portion of the escrow funds to the eligible firms listed in Appendices 1 and 2 that file refund applications and demonstrate injury in accordance with the presumptions and findings which will be described in Section C below. Refunds will be authorized to those firms in the amounts indicated, plus accrued interest to the date they receive refunds.<sup>3</sup> However, we have been unable to directly solicit applications from the firms listed in Appendix 2 since their current addresses are not known. In an attempt to locate those firms, we will provide Marine and various petroleum dealers' associations with copies of this Decision and will publish a notice in the *Federal Register* as well as in area newspapers. We will accept information regarding the identity and present location of these firms for a period of 90 days from the date of publication of this Decision and Order in the *Federal Register*.<sup>4</sup>

#### B. Refunds to Unidentified Purchasers

As previously noted, this Decision concerns the distribution of the entire \$216,196.10 that Marine deposited into the escrow account through June 18, 1982, plus accrued interest since that date. Since the refunds tentatively allotted to identified purchasers total \$101,719.36, the remaining portion of the Marine consent order funds may be distributed among first purchasers other than those identified by the ERA audit, and to customers of Marine's company-affiliated retail and wholesale firms, provided they can make the necessary demonstration of injury.

Since it was impossible for ERA to assign specific overcharges to unidentified customers and repurchasers, we will use a volumetric method to determine the potential refunds for these applicants. This method presumes that the unassigned alleged overcharges were spread equally over all the gallons of motor gasoline sold by Marine to unidentified purchasers during the consent order period. Under the volumetric method, a

<sup>3</sup> The refund amounts have been adjusted from those computed by ERA to reflect the larger principal amount in escrow resulting from Marine's payments of installment in escrow resulting from Marine's payments of installment interest. The refund amounts were recalculated according to the following formula: we divided the \$198,500 original principal amount into the new principal amount, \$216,196.10 to obtain a factor of 1.089149. We then multiplied this factor by the amounts attributed to each firm to obtain the revised refund amounts.

<sup>4</sup> If we are unable to locate any firm listed in Appendix 2, we will reserve any funds allocated to that firm for distribution in a subsequent proceeding.

previously unidentified claimant that adequately demonstrates injury (see Section C below) will be eligible to receive a refund equal to the number of gallons it purchased from Marine times the volumetric factor. The volumetric factor is the average per gallon refund and in this case equals \$0.002529 per gallon.<sup>5</sup> In addition, successful claimants will receive a proportionate share of the accrued interest.

We recognize that the impact on an individual purchaser could have been greater than that estimated by using the volumetric factor, and any purchaser may file a refund application based on a claim that it suffered a disproportionate share of the alleged overcharges. See *Sid Richardson Carbon & Gasoline Co. and Richardson Products Co./Siouxland Propane Co.*, 12 DOE ¶ 85,054 at 88,164 (1984), and cases cited therein. Similarly, purchasers identified in the ERA audit may attempt to show that they should receive refunds greater than those indicated in the Appendix. If valid claims exceed the funds available in escrow, all refunds will be reduced proportionately. Actual refunds will be determined only after analyzing all appropriate claims.

#### C. Demonstration of Injury

The assignment of overcharge amounts to both identified and unidentified purchasers is only the first step in the distribution process. We must also determine whether these claimants were injured or were able to pass through the alleged overcharges. In order to be eligible to receive a refund, all claimants will have to file an application and, with the three exceptions discussed below, show the extent to which they were injured by the alleged overcharges. To extent that any individual or firm can establish injury, it will be eligible for a share of the consent order fund.

In this case, we will adopt two rebuttable presumptions as well as two findings regarding injury. These presumptions and findings have been used in many previous special refund cases. First, we will presume that purchasers of Marine motor gasoline who are claiming small refunds (\$5,000 or less) were injured by the alleged overcharges. Second, in the absence of compelling material, we will presume that spot purchasers were not injured. Third, we will make a finding that end-

<sup>5</sup> This per gallon factor is computed by dividing the \$114,476.74 available for distribution to unidentified customers of Marine's company-affiliated retail and wholesale firms, by the estimated 45,273,041 gallons sold by Marine to these firms during the consent order period.



users or ultimate consumers of Marine products whose business operations are unrelated to the petroleum industry were injured by the alleged overcharges.<sup>6</sup> Lastly, we will not require a detailed demonstration of injury from regulated utilities or agricultural cooperatives that purchased Marine motor gasoline and passed the alleged overcharges associated with that product through to their end-user members. We will require such applicants to certify that they will pass any refund received through to their customers, to provide us with a full explanation of how they plan to accomplish this restitution, and to notify the appropriate regulatory body of their receipt of any refund money. Prior OHA decisions provide detailed explanations of the bases of these presumptions and the end-user finding. *E.g., Peterson Petroleum, Inc.*, 13 DOE ¶ 85,191 at 88,508-10 (1985). The rationale for these presumptions and findings was also fully explained in the PD&O. 50 FR. 53,390 at 53,391-92 (December 31, 1985). These presumptions will permit claimants to apply for refunds without incurring disproportionate expenses and will enable the OHA to consider the refund applications in the most efficient way possible in view of the limited resources available.

In the PD&O we proposed that a demonstration that "banks" of unrecovered product costs existed, along with information showing that the applicant was competitively disadvantaged in its local market, would be a sufficient showing of injury for reseller-retailer applicants claiming refunds above the \$5,000 threshold. *See, e.g., Triton Oil and Gas Corp./Cities Service Company*, 12 DOE ¶ 85,107 (1984); *Tenneco Oil Company/Mid-Continent Systems, Inc.*, 10 DOE ¶ 85,009 (1982). There were no objections to this demonstration, and we will adopt this requirement for larger reseller and retailer applicants in this proceeding.<sup>7</sup>

<sup>6</sup> We reason that many potential applicants which purchased Marine motor gasoline from company-owned service stations will find it difficult to document purchases made so many years ago. Therefore, if credit card or other receipts no longer exist, applicants may submit estimates of purchases accompanied by a detailed explanation of how the estimated purchase volumes were derived. For instance, this information might include the type and number of vehicles owned, the number of miles driven, etc. *See Thornton Oil Corp.*, 12 DOE ¶ 85,112 at 88,330 (1984).

<sup>7</sup> Resellers or retailers who claim a refund in excess of \$5,000 but who cannot establish that they did not pass through the price increases will be eligible for a refund of up to the \$5,000 threshold, without being required to submit evidence of injury beyond documentation of volumes purchased. Firms potentially eligible for greater refunds may choose to limit their claims to \$5,000. *See Vickers*, 8 DOE at

As in previous cases, only claims for at least \$15 plus interest will be processed. In prior refund cases we have found that the cost of processing claims for smaller amounts outweighs the benefits of restitution. *See, e.g., Uban Oil Co.*, 9 DOE at 85,225. *See also* 10 CFR 205.286(b). The same principle applies here.

### III. Application for Refund Procedures

We have determined that by using the procedures described above, we can distribute the Marine consent order fund as equitably and efficiently as possible. Accordingly, we shall now accept applications for refund from eligible customers who purchased Marine motor gasoline during the consent order period, November 1, 1973 through April 30, 1974. There is no official application form. The following information should be included in all Applications for Refund:

1. The name of the consent order firm: Marine Petroleum Company and Mars Oil Company, the case number: HEF-0122, and the applicant's name should be prominently displayed on the first page.

2. The name, position title, and telephone number of a person who may be contacted by us for additional information concerning the Application.

3. The manner in which the applicant used the Marine motor gasoline, *i.e.*, whether it was a reseller or end-user.

4. The volume of Marine motor gasoline that the applicant purchased in each month of the period for which it is claiming it was injured by the alleged overcharges. A firm identified in the ERA audit may choose to submit a statement verifying that it purchased motor gasoline from Marine and is willing to rely on the data in the audit files.

5. If the applicant is a reseller who wishes to claim a refund in excess of \$5,000, it should also:

(a) State whether it maintained banks of unrecouped product cost increases and furnish the OHA with quarterly bank calculations from the month in which purchases were first made until the termination of banking regulations (July 15, 1979 for retailers; April 30, 1980 for resellers and retailers-resellers).

(b) Submit evidence to establish that it could not pass through the alleged overcharges to its customers. For example, a firm may compare the prices it paid for Marine motor gasoline with

the prices paid for that product by its competitors to show that price increases to recover alleged overcharges were infeasible.

6. A statement of whether the applicant was in any way affiliated with Marine. If so, the applicant should state the nature of the affiliation.

7. A statement of whether there has been any change in ownership of the entity that purchased the motor gasoline from Marine since the end of the consent order period. If so, the name and address of the current (or former) owner should be provided.

8. A statement of whether the applicant is or has been involved as a party in any DOE or private, Section 210 enforcement actions. If these actions have been terminated, the applicant should furnish a copy of any final order issued in the matter. If the action is ongoing, the applicant should describe the action and its current status. The applicant is under a continuing obligation to keep the OHA informed of any change in status during the pendency of its Application for Refund. *See* 10 CFR 205.9(d).

9. The following signed statement:

I swear (or affirm) that the information submitted is true and accurate to the best of my knowledge and belief. *See* 10 CFR 205.283(c); 18 U.S.C. 1001.

All applications must be filed in duplicate and must be received within 90 days from the date of publication of this Decision and Order in the Federal Register. A copy of each application will be available for public inspection in the Public Reference Room of the Office of Hearings and Appeals. Any applicant which believes that its application contains confidential information must indicate this and submit two additional copies of its application from which the information has been deleted. All applications should refer to Case No. HEF-0122 and should be sent to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585.

### It Is Therefore Ordered That:

(1) Applications for Refunds from the funds remitted to the Department of Energy by Marine Petroleum Company and Mars Oil Company pursuant to the Consent Order executed on September 1, 1981, may now be filed.

(2) All applications must be filed no later than 90 days after publication of

85,396. *See also* Office of Enforcement, 10 DOE ¶ 85,029 at 88,125 (1982) (Ada).



this Decision and Order in the Federal Register.

George B. Breznay,

Director Office of Hearings and Appeals.

Dated: July 23, 1986.

#### APPENDIX I

Name and address	Escrow amount
Checker Oil Co., P.O. Box 162, Hazel Crest, IL 60429	\$2,420.98
Martin Oil, 144 Weldon Parkway, Maryland Heights, MO 63043	4,600.83
Sirco Oil, 7755 Carondelet, Clayton, MO 63105	1,713.49
Leonard, 7755 Carondelet, Clayton, MO 63105	760.68
J.D. Street, 144 Weldon Parkway, Maryland Heights, MO 63043	4,495.66
Triangle Refineries, Inc., P.O. Box 3367, Houston, TX 77001	5,135.69
Sid Blankenship, Hillsboro, IL 62049	120.38
Robert Brace Service, Wellsville, MO 63384	185.80
Charles Browder Marine, P.O. Box 623, Fulton, KY 42041	682.23
Central Petroleum, Centralia, IL 62801	325.42
C.J. Coddington, 1727 West 50th, O'Fallon, IL 62289	208.92
Raymond Cornwell-Cornwell Oil Co., 401 E. Main St., E. Prairie, MO 63845	211.36
C.S.C. Oil Co., P.O. Box 1713, Louisville, KY 40201	416.22
C.C. Dillon Oil Co., 1342 Lonedell Rd., Arnold, MO 63010	1,752.21
Herbert Duck, Marine Service Station, Dyer, TN 38330	331.23
Gold Oil Co., 701 Sharmen Rd., Bellsville, IL 62221	308.39
Henry County Board of Education, Paris, TN 38242	152.20
James Jennings Summit Service, Rt. 1, Desota, MO 63020	83.89
Keys & Son Oil Co., Villa Ridge, MO 63089	261.27
Billy J. Lawson, Franklay, MO 63644	99.20
Laws Enterprises (Bi-Rite), 2110 Chouteau, St. Louis, MO 63103	75.49
Manchester Leasing, 1075 S. Brentwood Blvd., St. Louis, MO 63117	*10.34
McCollum Service Station, Vandalia, MO 63382	60.37
Midwest Petroleum, 6760 Southwest Ave., St. Louis, MO 63143	1,156.00
Mofitt Oil Co., R.R. 3, Waterloo, IL 62296	91.44
Mullinicks & Boone, Marine Service Station, McEwen, TN 37101	167.34
Clyde Nixon, Highway 21, East, Potosi, MO 63364	224.33
Niemeyer Brothers, Hwy 54 West, Bowling Green, MO 63334	84.72
Fred Nixon Service Station, R.R.1, Mineral Point, MO 63660	263.41
Obion County Highway Department, E. Jackson St., Union City, TN 38261	116.97
Obion County Board of Education, Troy, TN 38260	*8.63
Onyx Oil, 11345 Olive St. Rd., Creve Coeur, Mo 63141	424.32
James Petty Route 5, Trenton, TN 38382	107.36
Saveway Oil Co., P.O. Box 338, Cape Girardeau, MO 63701	4,591.55
Super Gas, P.O. Box 248, Arnold, MO 63010	11,462.81
Tenneco Oil Co., P.O. Box 101229, Atlanta, GA 30302	507.00
Len Theolo, 1020 Hawthorn, St. Charles, MO 63301	399.35
Walker Oil Co., P.O. Box 130, Dyersburg, TN 38024	48.99
Flash Oil, 7755 Carondelet, Clayton, MO 63105	32,272.98
Site Oil, 7755 Carondelet, Clayton, MO 63105	19,208.66
Total	95,589.11

As noted in the text of the Decision, we do not intend to process refunds below \$15.

#### APPENDIX II

Name and last known address	Escrow amount
Star Service, 156 Progress Parkway, Maryland Heights, MO 63043	\$641.33
Lincoln Treas. City, GPO Box 1, New York, NY 10116	811.20
City Ice & Fuel Co., Wickliffe, KY 42087	190.34

#### APPENDIX II—Continued

Name and last known address	Escrow amount
Feld Chevrolet, 7700 Manchester Road, St. Louis, MO 63143	12.10 <sup>1</sup>
Marvel Oil, 6258 Etzel Ave., St. Louis, Mo 63133	2.98 <sup>1</sup>
Lewis Minviss, 4517 Minnetonka Blvd., Minneapolis, MN 55416	539.55
Reynolds Service Station, 1403 Church St., Tip-topville, TN 38079	87.49
Weldon Turner, 1300 N. Main, Desota, MO 63020	115.47
Wides Oil Co., Murphysboro, IL 62966	3,730.79
Total	6,131.25

<sup>1</sup> As noted in the text of this Decision, we do not intend to process refunds below \$15.00.

#### Appendix III.—Wholesale Affiliates of Marine Petroleum Company<sup>1</sup>

##### Name of Firm

Dodgoma  
Second Oil  
Jupiter  
Cherochat Oil  
Jor Hunt Oil  
Mars Oil  
Illinois Marine  
Illinois Waterways  
Mort Jackson Oil  
Oscark Oil Terminal  
Neark Oil  
Jonark Oil  
Cornark Oil  
North Broadway Terminal  
Dexmo Oil Terminal  
Air Berk Oil  
Hopken Oil  
Milan Main Oil  
Clariver Oil  
Gasoline Transport Company  
Pipeline Oil  
Mars Barge and Special  
[FR Doc. 86-17401 Filed 7-31-86; 8:45 am]

BILLING CODE 6450-01-M

#### Proposed Refund Procedures

**AGENCY:** Office of Hearings and Appeals, Department of Energy.

**ACTION:** Notice of Special Refund Procedures.

**SUMMARY:** The Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the proposed procedures for disbursement of \$5,095,000 (plus accrued interest) obtained from Berry Holding Company, Berry & Ewing and Surprise Oil Company, Case No. KEF-0027; and Saxon Oil Company, Case No. KEF-0028. The OHA has tentatively decided that the funds will be distributed in

<sup>1</sup> Firms and individuals which purchased motor gasoline during the relevant period from any of the firms listed in this Appendix are eligible to apply for a share of the consent order funds.

accordance with the DOE Policy of Restitution for Crude Oil Overcharges.

**DATE AND ADDRESS:** Comments must be filed in duplicate by September 2, 1986, and should be addressed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington, DC. 20585. All comments should display a conspicuous reference to Case No. KEF-0027 and/or Case No. KEF-0028.

**FOR FURTHER INFORMATION CONTACT:** Thomas Wieker, Deputy Director, or Matthew Huston, Staff Analyst, Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, DC. 20585, (202) 252-2400.

**SUPPLEMENTARY INFORMATION:** In accordance with § 205.282(b) of the procedural regulations of the Department of Energy (DOE), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures that the DOE has tentatively formulated to distribute monies obtained from Berry Holding Company, Berry & Ewing and Surprise Oil Company (Berry); and Saxon Oil Company (Saxon). Berry and Saxon remitted monies to the DOE to settle possible pricing violations with respect to their sales of crude oil. The funds received from Berry and Saxon are being held in interest-bearing escrow accounts pending distribution by the DOE.

The DOE has tentatively decided that distribution of the monies received from Berry and Saxon will be governed by the DOE Policy of Restitution for Crude Oil Overcharges, 50 FR. 27400 (1985). That policy states that all overcharge funds associated with crude oil miscertifications should be held in escrow pending Congressional action.

Applications for Refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of publication of this notice in the Federal Register and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1:00 p.m. and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000



Independence Avenue, SW.,  
Washington, DC 20585.

Dated: July 18, 1986.

George B. Breznay,

Director, Office of Hearings and Appeals.

July 18, 1986.

# **Proposed Decision and Order of the Department of Energy; Special Refund Procedures**

Names of Cases: Berry Holding

Company, Berry & Ewing and

Surprise Oil Company, Saxon Oil

Company

Date of Filings: April 11, 1986

Case Numbers:

KEF-0027

KEF-0028

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special refund procedures. See 10 CFR Part 205, Subpart V. Such procedures enable the DOE to refund monies to those injured by alleged violations of the DOE pricing regulations.

The ERA has requested that the OHA formulate procedures to distribute \$5,095,000 plus interest which the DOE received from Berry Holding Company, Berry & Ewing and Surprise Oil Company (collectively referred to as Berry); and Saxon Oil Company (Saxon).

## **I. Background**

Berry and Saxon were crude oil producers subject to the DOE's Mandatory Petroleum Price Regulations. During the period August 1973 through February 1977, Berry was the owner and operator of the Berry & Ewing and Surprise properties in Kern County, California. An audit of the firm's activities at these two properties revealed that Berry may have miscertified "old" oil as "stripper" oil, and also may have exceeded the ceiling price for several types of crude oil. These allegations were included in a June 10, 1977 Remedial Order issued to Berry by the Director of the Compliance Division of Region IX of the Federal Energy Administration (FEA). Berry sold allegedly miscertified crude oil, as well as allegedly overpriced crude, to the Independent Oil Producers' Association, which, in turn, sold the products to the Union Oil Company. Berry's Appeal challenging the Remedial Order was denied by the OHA. *Berry Holding Co.*, 2 DOE ¶80,101 (1978). Berry appealed OHA's decision in the U.S. District Court for the Eastern District of California. Under the terms of a December 15, 1983 Agreed Final

Judgment, Berry remitted \$4.975 million plus interest to the DOE.<sup>1</sup> The Agreed Final Judgment settles the DOE allegations contained in the June 1977 Remedial Order.

The DOE also alleged that Saxon violated the DOE petroleum pricing regulations during the period from September 1, 1973 through September 30, 1978. The alleged violations include miscertification of "old" oil as "stripper" oil, and other types of crude oil violations, at six properties operated by Saxon in Reagan and Taylor Counties, Texas. A December 31, 1984 Consent Order between Saxon and the DOE settled the DOE allegations by requiring Saxon to remit \$120,000 to the DOE.

## **II. Jurisdiction and Authority To Fashion Refund Procedures**

The general guidelines that the OHA may use to formulate and implement a plan to distribute funds are set forth in 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations where the DOE cannot readily identify (1) the persons who may have been injured as a result of alleged or adjudicated violations, or (2) the amount of each person's injuries. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, see *Office of Enforcement*, 9 DOE ¶82,508 (1981), and *Office of Enforcement*, 8 DOE ¶82,597 (1981).

We have considered the ERA's petitions to implement Subpart V proceedings with respect to the monies received from Berry and Saxon and have determined that such proceedings are appropriate. Accordingly, we will grant the ERA's petitions.

## **III. DOE Policy Regarding Crude Oil Overcharges**

The monies Berry and Saxon remitted to the DOE settle alleged crude oil overcharges. Therefore, we propose that the DOE Policy of Restitution for Crude Oil Overcharges, 50 FR 27400 (1985) (DOE Policy), govern the distribution of the funds.

The DOE Policy is to hold all overcharge funds associated with crude oil miscertifications in escrow, pending Congressional action. The Policy stems from a report that the OHA issued in the *Stripper Well Exemption Litigation*. *Report of the Office of Hearings and Appeals, In re: The Department of Energy Stripper Well Exemption Litigation*, MDL No. 378 (D. Kan. filed June 21, 1985), Fed. Energy Guidelines

<sup>1</sup> Berry has not admitted to any violations of the DOE regulations. As of June 30, 1986, the Berry funds in escrow totalled \$10,435,406.69.

¶ 90,507 (1985) (the OHA Report). The OHA Report examined the general effect of crude oil miscertifications on the Entitlements Program.<sup>2</sup>

On the basis of the OHA's findings, the Deputy Secretary of Energy issued a statement establishing the DOE Policy on June 21, 1985. The statement concluded that an indirect means of effectuating restitution was appropriate in cases involving crude oil overcharges. 50 FR 27400 (July 2, 1985). Accordingly, the policy statement announced that the DOE would maintain overcharge monies in escrow to afford Congress the opportunity to select the means of making indirect restitution. The DOE stated that if Congress had not acted on the issue by the fall of 1986, the funds should be paid to the miscellaneous receipts accounts of the United States Treasury in order to benefit all Americans. *Id.*

In light of the DOE Policy, the OHA issued an Order announcing that it intended to apply the DOE policy in special refund proceedings involving crude oil. 50 FR 27402 (July 2, 1985). The OHA solicited comments which were considered and rejected in *Amber Refining, Inc.*, 13 DOE ¶ 85,217 (1985) (*Amber*). Thus, the OHA has determined that it will apply the DOE policy in implementing special refund procedures in cases like the present one.

## **IV. Refund Procedures**

In view of the OHA's decision in *Amber*, we propose that the refund monies received from Berry and Saxon should be pooled with other crude oil settlement funds and distributed in accordance with the DOE Policy.

Before taking the action which we have proposed, we intend to publicize our proposal and to solicit comments on it. Comments regarding the tentative distribution process set forth in this Proposed Decision should be filed with the Office of Hearings and Appeals within 30 days of publication of this Proposed Decision and Order in the Federal Register.

It Is Therefore Ordered That: The funds obtained from Berry Holding

<sup>2</sup> The Crude Oil Entitlements Program, part of the DOE's system of mandatory petroleum price and allocation controls, was in effect from November 1974 through January 1981. The program was intended to equalize access to the benefits of crude oil price controls among all domestic refiners and their downstream customers. To accomplish this end, refiners were required to make transfer payments among themselves through the purchase and sale of entitlements. The program dispersed overcharges resulting from crude oil miscertifications throughout the domestic refining industry. *Amber Refining, Inc.*, 13 DOE ¶ 85,217 (1985).



Company, Berry & Ewing and Surprise Oil Company pursuant to a December 15, 1983 Agreed Final Judgment with the Department of Energy; and the monies remitted by Saxon Oil Company pursuant to a December 31, 1984 Consent Order with the Department of Energy will be distributed in accordance with the foregoing Decision.

[FR Doc. 86-17400 Filed 7-31-86; 8:45 am]

BILLING CODE 6350-01-M

## ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3058-5]

### Availability of Environmental Impact Statements

Responsible Agency: Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5075. Availability of Environmental Impact Statements Filed July 21, 1986 Through July 25, 1986 Pursuant to 40 CFR 1506.9.

EIS No. 860295, Draft, IBR, OR, Umatilla Basin Water Supply Project, Umatilla River Steamflows and Fishery Improvement, Umatilla and Morrow Counties, Due: October 31, 1986, Contact: John Woodworth (208) 334-1207.

EIS No. 860296, Draft, SCS, PA, West Branch Brandywine Creek Watershed, Protection and Flood Prevention Plan, Chester and Lancaster Counties, Due: September 15, 1986, Contact: James Olson (717) 782-4453.

EIS No. 860297, Final, FWS, NY, Honeoye Creek Wetland Expansion and Enhancement Project, Ontario County, Due: September 2, 1986, Contact: Howard Larsen (617) 965-5100.

EIS No. 860298, Final, VAD, MI, Allen Park Veterans Administration Medical Center, Replacement and Modernization, Construction, Wayne County, Due: September 2, 1986, Contact: Susan Livingstone (202) 389-2922.

EIS No. 860299, Draft, BLM, CO, Wolf Ridge Nahcolite Solution Mine, Construction and Operation, Piceance Basin, Rio Blanco County, Due: September 23, 1986, Contact: Willy Frank (303) 878-3601.

EIS No. 860300, Final, SCS, AR, Tyronza River Watershed Protection and Flood Prevention Plan, Due: September 2, 1986, Contact: Jack Davis (501) 378-5445.

EIS No. 860301, Final, UAF, CA, White Point Air Force Space Division Housing Project, Construction and Operation, Los Angeles Air Force Station, Los Angeles County, Due: September 2, 1986, Contact: Robert Mason (213) 643-0933.

EIS No. 860302, DSUPPL, FHW, RI, Woonsocket Industrial Highway/RI-99 Construction, I-295 Interchange to RI-146/RI-146A, Due: September 15, 1986, Contact: Gordon Hoxie (401) 528-4541.

### Amended Notices

EIS No. 860360, Final, FHW, LA, Eden Isles Interchange Construction, I-10 Access Point, St. Tammany Parish, OFFICIALLY WITHDRAWN.

EIS No. 840095, Draft, COE, LA, West Bank Hurricane Protection Levee Construction, Jefferson Parish, Published in the Federal Register March 16, 1984—OFFICIALLY WITHDRAWN.

Dated: July 28, 1986.

Allan Hirsch,

Director, Office of Federal Activities.

[FR Doc. 86-17403 Filed 7-31-86; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3058-6]

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared July 14, 1986 through July 18, 1986 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5076/73. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated February 7, 1986 (51 FR 4804).

### Draft EISs

ERP No. D-AFS-L65102-00, Rating EO2, Wallowa-Whitman Nat'l Forest, Land and Resource Mgmt. Plan, OR and ID. SUMMARY: EPA believes the draft EIS and Plan does not clearly provide the necessary protection for water quality and sensitive beneficial uses given the major grazing and timber harvesting outputs proposed. EPA's concerns include: (1) Insufficient analysis of existing conditions and risks to water quality and beneficial uses due to sedimentation from planned activities, (2) standards relating to fish habitat and riparian areas are too general to assure adequate protection of these important resources, and (3) the draft EIS has an unclear commitment that activities unable to meet the standards adopted would not be allowed to occur unmodified.

ERP No. DS-COE-A32456-AL, Rating EC2, Black Warrior and Tombigbee Rivers Maintenance and Operation,

New Information, AL. SUMMARY: EPA believes the project would solve the problems associated with maintaining navigation. However, EPA expressed concerns over the apparent continued losses of bottomland hardwood wetlands and suggested an onsite coordination meeting to determine the extent of jurisdictional wetlands that may be lost in this instance.

ERP No. D-FHW-E40694-KY, Rating EC2, Blankenbaker Rd./I-64 Interchange Improvement, KY-1819 to US 60, 404 Permit, KY. SUMMARY: EPA requested that the final EIS include additional alternative analysis and a biological assessment of streams. It was also requested that noise mitigation measures be implemented.

ERP No. DS-FHW-F40151-MI, Rating LO, I-94 Improvements, Merriman and Middlebelt Rds. Interchanges, New Preferred Construction Alternative, Right-of-Way Acquisition, MI. SUMMARY: EPA's review resulted in no objections to the proposed activity.

ERP No. D-FHW-F40287-MI, Rating LO, I-96 BL/Cedar Street Improvement, Cloverland Drive to Mt. Hope Road, Reconstruction, Right-of-Way Acquisition, MI. SUMMARY: EPA has no objection to the proposed project.

ERP No. DB-USN-E11006-GA, Rating LO, Kings Bay Fleet Ballistic Missile Submarine Support Base, St. Mary's Entrance Channel Dredging Programs Modifications, GA. SUMMARY: EPA agrees that changes proposed in this supplement EIS will not result in any long-term adverse impacts.

### Final EISs

ERP No. F-AFS-F65010-MN, Superior Nat'l Forest, Land and Resource Mgmt. Plan, MN. SUMMARY: EPA's review resulted in no objections to implementation of the preferred alternative.

ERP No. F-AFS-F65011-MN, Chippewa Nat'l Forest, Land and Resource Mgmt. Plan, MN. SUMMARY: EPA has no objections with the proposed activity as described.

ERP No. F-AFS-J65103-MT, Lewis and Clark Nat'l Forest, Land and Resource Mgmt. Plan, Implementation, and Wilderness Designation Recommendation, MT. SUMMARY: EPA's concerns with the draft EIS have been adequately addressed and EPA has no objections to the proposed activity as described.

ERP No. F-AFS-F65145-MT, Deerlodge Nat'l Forest, Noxious Weed and Poisonous Plants Control Program, MT. SUMMARY: EPA's concerns were adequately addressed in the final EIS.



ERP NO. F-AFS-J82003-MT, Beaverhead Nat'l Forest, Noxious Weeds and Poisonous Plant Control Program, MT. SUMMARY: EPA's concerns were adequately addressed in the final EIS.

ERP No. F-AFS-K65092-CA, Cleveland Nat'l Forest, Land and Resource Mgmt. Plan, CA. SUMMARY: EPA offered additional comments regarding the protection of water quality, and requested that the Forest Service keep it apprised of the progress in carrying out mitigation measures to protect water quality.

ERP No. FS-COE-F35029-MN, Upper Mississippi River Lower Pool 5 Channel Maintenance and Weaver Bottoms Rehabilitation Plan, Dredged Material Maintenance, MN. SUMMARY: EPA's review resulted in no objections to the proposed project.

ERP No. F-COE-G34041-TX, Palo Duro Creek Multi-purpose Dam Project, TX. SUMMARY: EPA has no objections to the proposed action with proper implementation of mitigation measures as described.

ERP No. F-FHW-K40103-NV, US 395 Reconstruction and Relocation, Lake Tahoe Junction North to Arrowhead Drive, Right-of-Way Acquisition, NV. SUMMARY: EPA's prior concerns were adequately addressed in the final EIS.

ERP No. F-NOA-B91021-00, Northeast Multi-Species Fishery Mgmt. Plan, Adoption, Approval and Implementation, MA, ME, NH, RI, and CT. SUMMARY: EPA believes that the FMP will not cause significant adverse impacts to the physical environment.

ERP No. F-NOA-K64005-HI, Hawaiian Monk Seal Critical Habitat Designation, HI. SUMMARY: EPA had no comments to offer on the final EIS.

ERP No. F-SCS-G36133-LA, Acadia Parish Fifth Ward Watershed Protection and Flood Prevention Plan, 404 Permit, LA. SUMMARY: EPA has no objections to the proposed action with proper implementation of the mitigation measures as described.

#### Amended Notice

The following review should have appeared in the FR Notice published on July 25, 1986.

ERP No. F-OSM-J01059-WY, East Gillette Federal Mine, Mining Plan, Approval and Operating Permit, WY. SUMMARY: EPA continues to have concerns that the final EIS fails to specify the water quality parameters to be monitored. EPA recommends that the Final Mining Plan be accompanied by the necessary NPDES permits and identify which water quality parameters will be included in the monitoring program.

Dated: July 29, 1986.

Allan Hirsch,  
Director, Office of Federal Activities.  
FR Doc. 86-17404 Filed 7-31-86; 8:45 am  
BILLING CODE 6560-50-M

#### [SAB-FRL-3058-2]

#### Science Advisory Board Environmental Health Committee's Drinking Water Subcommittee; Open Meeting

Under Pub. L. 92-463, notice is hereby given that a two-day meeting of the Drinking Water Subcommittee of the Environmental Health Committee of the Science Advisory Board will be held on August 21-22, 1986, in the North Conference Center, Room 3, Waterside Mall, 401 M Street SW., Washington, DC 20460. The meeting will start at 9:00 a.m. on August 21 and adjourn no later than 1:00 p.m. on August 22.

The purpose of the meeting will be to (1) to receive a briefing on recent revisions to the Safe Drinking Water Act, (2) to discuss other items of interest to the Subcommittee and (3) to comment on a draft Drinking Water Criteria Document for Nitrate/Nitrite (TR-540-59D: October, 1985). A proposed recommended maximum containment level for nitrate/nitrite was published on November 13, 1985 (50 FR 46936-47022). A public review meeting was held on January 28, 1986, and the public comment period closed on March 13, 1986. The comments received to date are under review by EPA. To obtain a copy of the draft document, write to the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161 or phone (800) 336-4700. A fee will be charged. Additional comments on the draft document may be submitted by mail to the Comment Clerk, Criteria and Standards Division (WH-550), Office of Drinking Water, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

The meeting will be open to the public. Any member of the public wishing to attend or present information, or desiring further information on the meeting, should contact Dr. Daniel Byrd, Executive Secretary to the Committee, by telephone at (202) 382-2552 or by mail to: Science Advisory Board (A-101F), 401 M Street SW., Washington, DC, 20460, no later than c.o.b. on August 19, 1986.

Dated: July 24, 1986.

Terry F. Yosie,  
Staff Director, Science Advisory Board.  
[FR Doc. 86-17355 Filed 7-31-86; 8:45 am]  
BILLING CODE 6560-50-M

#### [OPTS-44016] [FRL-3057-9]

#### TSCA Chemical Testing; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

**SUMMARY:** This notice announces test data submissions received by EPA during the third quarter of 1986 from voluntary industry testing programs on certain chemical substances or groups of chemicals considered by EPA under section 4 of the Toxic Substances Control Act (TSCA).

#### FOR FURTHER INFORMATION CONTACT:

Edward A. Klein, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-543, 401 M St. SW., Washington, DC 20460  
Toll free: (800-424-9065), In Washington, D.C.: (554-1404)

Outside the USA: (Operator-202-554-1404)

**SUPPLEMENTARY INFORMATION:** Section 4(d) of TSCA requires the EPA to issue a notice in the Federal Register reporting the receipt of test data submitted pursuant to test rules promulgated under section 4(a). In the Federal Register of June 30, 1986 (51 FR 23705), EPA issued procedures for entering into Enforceable Consent Agreements (ECAs) under section 4 of TSCA. Those procedures provide that EPA will follow the procedures specified in section 4(d) in providing notice of test data received pursuant to ECAs. In addition, EPA from time to time receives industry submissions of test data developed voluntarily (i.e., not under test rules or ECAs) on chemicals EPA has considered for testing under section 4. Although not required by section 4(d), EPA periodically issues notices of receipt of such test data.

#### I. Test Data Submissions

This notice announces test data submissions received during the third quarter (April-June) of 1986 from voluntary industry testing programs.

The following table lists the chemicals by CAS No., date received, submitter, and type of study.



TABLE 1—3RD QUARTER TEST DATA SUBMISSIONS UNDER TSCA SECTION 4 [APRIL-JUNE 1986]

Chemical	CAS No.	Date Rec'd	Submitter	Study
Antimony Oxide	1309-64-4	Jun. 30, 1986	Antimony Oxide Industry Assoc.	Sediment (TLC).
Butylbenzyl Phthalate	85-68-7	May 12, 1986	Monsanto	96-Hr Toxicity (Hydra).
Butylbenzyl Phthalate	85-68-7	Apr. 9, 1986	Monsanto	Well water solubility.
Chlorotoluene <sup>1</sup>	95-49-8	Dec. 1, 1985	Hooker/Occidental Chemical Co.	Analytical data.
Cyclohexanone	108-94-1	Apr. 15, 1986	Industrial Health Foundation	2-Generation Reproduction (Rat) (Inhalation).
Di(2-ethyl-hexyl) terephthalate	6422-86-2	May 23, 1986	Eastman Kodak Co.	Seed Germination (Radish) (14-Day).
Di(2-ethyl-hexyl) terephthalate	6422-86-2	May 23, 1986	Eastman Kodak Co.	Seed Germination (Ryegrass) (14-Day).
Di(2-ethyl-hexyl) terephthalate	6422-86-2	May 23, 1986	Eastman Kodak Co.	Seed Germination (Soybeans) (14-Day).
Trichloro-ethane <sup>1</sup>	71-55-6	Mar. 4, 1986	DOW Chemical Co.	Chronic Oncogenicity (Rat) (Inhalation).
Tris(2-ethyl-hexyl) Trimellitate <sup>1</sup>	3319-31-1	Nov. 13, 1985	Chemical Manufact. Association	UDS (Rat).
Vinylidene Fluoride	75-38-7	Jun. 18, 1986	Penwalt/DuPont	90-Day Subchronic (Rat) (Inhalation).

<sup>1</sup> Not previously reported.

## II. Public Record

EPA has established a public record for this quarterly receipt of data notice (docket number OPTS-44016). This record includes copies of all studies reported in this notice. The record is available for inspection from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays, in the OPTS Reading Room, NE-G-004, 401 M St. SW., Washington, DC 20460.

Dated: July 22, 1986.

Joseph J. Merenda,

Director, Existing Chemical Assessment Division.

[FR Doc. 86-17356 Filed 7-31-86; 8:45 am]

BILLING CODE 6560-50-M

shall file a 12-day pre-election report due on October 23, 1986, with coverage dates from the closing date of the last report filed through October 15, 1986, and a 30-day post-election report due on December 4, 1986, with coverage dates from October 16, 1986, through November 24, 1986.

After filing these reports, committees should file a year-end report due January 31, 1987.

Dated: July 29, 1986.

Joan D. Aikens,

Chairman, Federal Election Commission.

[FR Doc. 86-17375 Filed 7-31-86; 8:45 am]

BILLING CODE 6715-01-M

Officer, Linda Shiley, (202) 646-2624, 500 C Street, SW., Washington, DC 20472.

Comments should be directed to Francine Picoult, (202) 395-7231, Office of Management and Budget, 3235 NEOB, Washington, DC 20503 within two weeks of this notice.

Dated: July 24, 1986.

Wesley C. Moore,

Acting Director, Office of Administrative Support.

[FR Doc. 86-17314 Filed 7-31-86; 8:45 am]

BILLING CODE 6718-01-M

## Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067-0167

Title: Claims of FEMA Personnel for Personal Property Damage or Loss

Abstract: This regulation specifies the procedures by which the Director of FEMA will settle and pay claims of employees of FEMA amounting to not more than \$25,000 for damage to or loss of personal property incident to their service in FEMA.

Type of Respondents: Individual or Households

Number of Respondents: 10

Burden Hours: 10

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 646-2624, 500 C Street, SW., Washington, DC 20472.

Comments should be directed to Francine Picoult, (202) 395-7231, Office of Management and Budget, 3235 NEOB, Washington, DC 20503 within two weeks of this notice.

## FEDERAL ELECTION COMMISSION

[Notice 1986-6]

### Filing Dates for North Carolina Special Elections

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of filing dates for North Carolina special elections.

**SUMMARY:** Committees required to file reports in connection with the North Carolina special elections to be held on November 4, 1986, must file a 12-day pre-election report by October 23, 1986, and a 30-day post-election report by December 4, 1986.

After filing these reports, committees should file a year-end report, due January 31, 1987.

### FOR FURTHER INFORMATION CONTACT:

Ms. Bobby Werfel, Public Information Office, 999 E Street NW., Washington, DC 20463, Telephone: (202) 376-3120, Toll free: (800) 424-9530.

### Notice of Filing Dates for Special Elections, Senate and 10th Congressional District, North Carolina

All principal campaign committees of candidates in the special elections and all other political committees which support candidates in these elections

## FEDERAL EMERGENCY MANAGEMENT AGENCY

### Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067-0139

Title: Federal Regional Reconstitution Area (FRRRA) Survey

Abstract: Data collectors will perform on-site surveys of potential reconstitution sites in order to confirm, upgrade, or expand information now stored in FEMA's data base on Federal Regional Reconstitution Areas.

Type of Respondents: State or Local governments; Businesses or other for-profit; Federal agencies or employees; Non-profit institutions; Small businesses or organizations  
Number of Respondents: 2,500  
Burden Hours: 2,500

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance



Dated: July 24, 1986.

Wesley C. Moore,

Acting Director, Office of Administrative Support.

[FR Doc. 86-17315 Filed 7-31-86; 8:45 am]

BILLING CODE 6718-01-M

#### Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067-0074

Title: Certificate of Labor Standards Compliance

Abstract: This is necessary to assure compliance with the Federal Labor Standards for construction of Emergency Operating Centers and emergency communications facilities by State and local governments where Federal Funding is provided for these programs.

Type of Respondents: State or Local governments

Number of Respondents: 150

Burden Hours: 150

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 646-2624, 500 C Street, SW., Washington, DC 20472.

Comments should be directed to Francine Picoult, (202) 395-7231, Office of Management and Budget, 3235 NEOB, Washington, DC 20503 within two weeks of this notice.

Dated: July 24, 1986.

Wesley C. Moore,

Acting Director, Office of Administrative Support.

[FR Doc. 86-17316 Filed 7-31-86; 8:45 am]

BILLING CODE 6718-01-M

#### FEDERAL HOME LOAN BANK BOARD

##### Central Illinois Savings, a Federal Savings Association, Virden, IL; Appointment of Receiver

Notice is hereby given that pursuant to the authority contained in section 5(d)(6)(A) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(6)(A) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Central Illinois Savings, a Federal Savings

Association, Virden, Illinois on July 25, 1986.

Dated: July 29, 1986.

Nadine Y. Penn,

Acting Secretary.

[FR Doc. 86-17373 Filed 7-31-86; 8:45 am]

BILLING CODE 6720-01-M

##### Major Federal Savings and Loan Assoc., Cincinnati, OH; Appointment of Receiver

Notice is hereby given that pursuant to the authority contained in section 5(d)(6)(A) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(6)(A) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for Major Federal Savings and Loan Association, Cincinnati, Ohio, on July 25, 1986.

Dated: July 28, 1986.

Nadine Y. Penn,

Acting Secretary.

[FR Doc. 86-17312 Filed 7-31-86; 8:45 am]

BILLING CODE 6720-01-M

[No. AC-494]

##### Ozark Rivers Federal Savings and Loan Assoc., Salem, MO; Final Action Approval of Conversion Application

Dated: July 25, 1986.

Notice is hereby given that on July 15, 1986, the Office of General Counsel of the Federal Home Loan Bank Board, acting pursuant to the authority delegated to the General Counsel or his designee, approved the application of Ozark Rivers Federal Savings and Loan Association, Salem, Missouri for permission to convert to the stock of organization. Copies of the application are available for inspection at the Secretariat of said Corporation, 1700 G Street, NW., Washington, DC 20552 and at the Office of the Supervisory Agent of said Corporation at the Federal Home Loan Bank of Des Moines, 907 Walnut Street, Des Moines, Iowa 50309.

By the Federal Home Loan Bank Board.

Nadine Y. Penn,

Acting Secretary.

[FR Doc. 86-17311 Filed 7-31-86; 8:45 am]

BILLING CODE 6720-01-M

#### FEDERAL MARITIME COMMISSION

##### Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments are found in section 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No. 212-010027-015.

Title: Brazil/U.S. Atlantic Coast Agreement.

Parties:

Companhia de Navegacao Lloyd Brasileiro  
Companhia de Navegacao Maritima Netumar S/A  
United States Lines (S.A.) Inc.  
A/S Ivarans Rederi  
Empresa Lineas Maritimas Argentinas S/A  
A. Bottacchi S.A. de Navegacion C.F.I.I.  
Van Nievelt, Goudriaan and Co., B.V.

Synopsis: The proposed amendment would establish a special carrying adjustment of 95% of the gross pool income for the carriage of certain specified cargoes.

Agreement No. 212-010320-012.

Title: Brazil/U.S. Gulf Ports Agreement.

Parties:

Companhia de Navegacao Lloyd Brasileiro  
Companhia de Maritima Nacional United States Lines (S.A.) Inc.  
Empresa Lineas Maritimas Argentinas S.A.  
A. Bottacchi S.A. de Navegacion C.F.I.I.  
Transportation Maritima Mexicana S.A.

Synopsis: The proposed amendment would add a new section to the agreement establishing a special carrying adjustment of 95 percent of the gross pool income for the carriage of certain specified cargoes.

Agreement No. 202-010689-016.

Title: Transpacific Westbound Rate Agreement.

Parties:

Kawasaki Kisen Kaisha, Ltd.  
Korea Marine Transport Co., Inc.  
A.P. Moller-Maersk Line  
American President Lines, Ltd.  
Evergreen Marine Corp. (Taiwan), Ltd.



Hanjin Container Lines, Ltd.  
Japan Line, Ltd.  
Hyundai Merchant Marine Co., Ltd.  
Mitsui O.S.K. Lines, Ltd.  
Neptune Orient Lines, Ltd.  
Nippon Yusen Kaisha, Ltd.  
Sea-Land Service, Inc.  
Showa Line, Ltd.  
United States Lines, Inc.  
Yamashita-Shinnihon Steamship Co., Ltd.

Orient Overseas Container Line, Inc.

Synopsis: The proposed amendment would modify the independent action provisions of the agreement to bring the agreement into compliance with the newly adopted rule concerning independent action provisions in conference agreements.

Agreement No. 207-010884-001.

Title: Trans Freight Lines Joint Venture Agreement.

Parties:

Trans Freight Lines, Inc.

TNT TFL Inc.

Overseas Container Limited

OCL (Trans Freight Lines) Ltd.

Synopsis: The proposed amendment would permit Trans Freight Lines, Inc. to enter into space charter arrangements or other agreements or contracts, subject to any applicable requirements of the Shipping Act of 1984. The parties have requested a shortened review period.

Agreement No. 203-010977.

Title: Hispaniola Discussion Agreement.

Parties: United States Atlantic and Gulf/Hispaniola Steamship Freight Association.

Independent Carrier Party: Zim Israel Navigation Co.

Synopsis: The proposed agreement would establish a cooperative working arrangement between the parties in the trades between ports and inland or coastal points in the U.S. Atlantic and Gulf Coast, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands, on the one hand, and ports in Haiti and the Dominion Republic, on the other hand; and between inland or coastal points served via such ports. It would permit the parties to meet, exchange information and agree upon rates and charges but would not authorize a common tariff nor require adherence to any agreement reached.

Agreement No. 225-010978.

Title: PMA/TMN Agency Agreement.

Parties:

Pacific Maritime Agencies, Inc. (PMA)

Thai Maritime Navigation Co., Ltd.

(TMN)

Synopsis: The proposed agreement would permit PMA to act as general steamship agent for TMN in the United

States. The parties have requested a shortened review period.

Agreement No. 202-010979.

Title: Caribbean Shipowners

Association.

Parties:

Tropical Shipping & Construction Co.,

Ltd. Sea-Land Service, Inc.

Trailer Marine Transport Corporation

Synopsis: The proposed agreement would permit the parties to create a rate-fixing association between Florida ports in the Jacksonville/Key West range, and inland Continental U.S. points (excluding Alaska and Hawaii) via such ports, and ports in the Leeward/Windward Islands, Barbados, and Trinidad and Tobago. The parties have requested a shortened review period.

Dated: July 29, 1986.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 86-17357 Filed 7-31-86; 8:45 am]

BILLING CODE 6730-01-M

#### [Agreement No. 224-010967]

#### Agreements Filed, etc; Correction

#### Container Corporation of America/ Ocean Highway and Port Authority Ground Lease Terminal Agreement

#### ERRATUM

The Federal Register Notice of June 30, 1986 (Vol. 51, No. 125, page 23601) stated that the above named agreement was filed with the Commission pursuant to section 5 of the Shipping Act of 1984. The agreement should have also been noticed pursuant to section 15 of the Shipping Act, 1916.

By Order of the Federal Maritime Commission.

Dated: July 29, 1986.

Joseph C. Polking,

Secretary.

[FR Doc. 86-17358 Filed 7-31-86; 8:45 am]

BILLING CODE 6730-01-M

#### FEDERAL RESERVE SYSTEM

#### BancServe Group, Inc., et al; Applications To Engage de Novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation

Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 22, 1986.

**A. Federal Reserve Bank of Chicago**  
(Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *BancServe Group, Inc.*, Rockford, Illinois; to engage *de novo* through its subsidiary, *BancServe Credit Life Insurance Company*, Rockford, Illinois, in underwriting credit life insurance and credit accident and health insurance that is directly related to the extension of credit by *BancServe Group, Inc.* and its subsidiaries pursuant to § 225.25(b)(9) of the Board's Regulation Y.

**B. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Clearwater Home State Bancshares, Inc.*, Clearwater, Kansas; to engage *de novo* through its subsidiary, *Home Financial Corporation*, Wichita, Kansas in making loans and other extensions of credit as would be made by consumer service and mortgage companies pursuant to § 225.25(b)(1) of



the Board's Regulation Y, and in the sale of money orders, savings bonds and traveler's checks pursuant to § 225.25(b)(12) of the Board's Regulation Y. These activities will be conducted in Kansas and Oklahoma.

Board of Governors of the Federal Reserve System, July 29, 1986.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 86-17309 Filed 7-31-86; 8:45 am]

BILLING CODE 6210-01-M

#### **Rush County National Corp. et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies**

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than August 22, 1986.

**A. Federal Reserve Bank of Chicago** (Franklin D. Dreyer, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Rush County National Corporation*, Rushville, Indiana; to become a bank holding company by acquiring 100 percent of the voting shares of Rush County National Bank, Rushville, Indiana.

**B. Federal Reserve Bank of Minneapolis** (Bruce J. Hedblom, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *N.E. Montana Bancshares, Inc.*, Plentywood, Montana; to become a bank holding company by acquiring 82.8

percent of the voting shares of Security State Bank, Plentywood, Montana.

2. *Security State Bank Employee Stock Ownership Plan and Trust*, Plentywood, Montana; to become a bank holding company by acquiring 37.9 percent of the voting shares of N.E. Montana Bancshares, Inc., Plentywood, Montana, and thereby indirectly acquire control of Security State Bank, Plentywood, Montana.

Board of Governors of the Federal Reserve System, July 28, 1986.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 86-17310 Filed 7-31-86; 8:45 am]

BILLING CODE 6210-01-M

#### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

##### **Office of the Secretary**

##### **Agency Forms Submitted to the Office of Management and Budget for Clearance**

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those packages submitted to OMB since the last list was published on July 25, 1986.

##### **Public Health Service**

(Call Reports Clearance Officer on 202-245-2100 for copies of packages)

##### **Food and Drug Administration**

Subject: Protection of Human Subjects—(Recordkeeping Requirements for Institutional Review Boards)—Extension—(0910-0130)

Respondents: Businesses or other for-profit; Federal agencies or employees; Non-profit institutions; Small businesses or organizations

Subject: Label Declarations: Cholesterol Content of Foods—Existing Collection

Respondents: Businesses or other for-profit

##### **Centers for Disease Control**

Subject: Prospective Evaluation of Health-Care Workers Exposed to Blood from Patients with HTLV-III/LAV Infection via the Parenteral Route—Extension—(0920-0131)

Respondents: Individuals or households

##### **National Institutes of Health**

Subject: Protection of Human Subjects—Certification and Recordkeeping—Reinstatement—(0925-0137)

Respondents: State or local governments; Businesses or other for-profit; Federal agencies or employees; Non-profit institutions; Small businesses or organizations

OMB Desk Officer: Bruce Artim

##### **Social Security Administration**

(Call Reports Clearance Officer on 301-594-5706 for copies of package)

Subject: Domestic Service Questionnaire—Extension—(0960-0047)

Respondents: Individuals or households  
Subject: State Contribution Return—Extension—(0960-0041)

Respondents: State or local governments  
Subject: Financial Status Report—Extension—(0960-0275)

Respondents: State or local governments  
Subject: Request for Funds for the Work Incentive Demonstration Program—Extension—(0960-0276)

Respondents: State or local governments  
OMB Desk Officer: Fay S. Iudicello

##### **Health Care Financing Administration**

(Call Reports Clearance Officer on 301-594-8650 for copies of package)

Subject: Medicaid Quarterly Showing—Extension—(0938-0061)—HCFA-41

Respondents: State or local governments  
Subject: Application for Hospital Insurance—Extension—(0938-0251)—HCFA-18

Respondents: Individuals or households  
Subject: Fire Safety Survey Report Forms—Revision—(0938-0242)—HCFA-2786

Respondents: State or local governments  
OMB Desk Officer: Fay S. Iudicello

##### **Office of Human Development Services**

(Call Reports Clearance Officer on 202-472-4415 for copies of package)

Subject: Impact Measures for the RAP Management Support Contract—Reinstatement—(0980-0103)

Respondents: State or local governments; Non-profit institutions  
OMB Desk Officer: Fay S. Iudicello

Copies of the above information collection clearance packages can be obtained by calling the Reports Clearance Officer on the number shown above.

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503. Attn: (name of OMB Desk Officer).



Dated: July 28, 1986.

Harry A. Hadd,

Acting Deputy Assistant Secretary for  
Management Analysis and Systems.

[FR Doc. 86-17346 Filed 7-31-86; 8:45 am]

BILLING CODE 4150-04-M

## Food and Drug Administration

[Docket No. 86E-0265]

### Determination of Regulatory Review Period for Purposes of Patent Extension; NIX

AGENCY: Food and Drug Administration.

ACTION: Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined the regulatory review period for Nix and is publishing this notice of that determination as required by law. FDA had made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims this human drug product.

**ADDRESS:** Written comments and petitions should be directed to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

#### FOR FURTHER INFORMATION CONTACT:

Michael W. Cogan, Office of Health Affairs (HFA-20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1382.

**SUPPLEMENTARY INFORMATION:** The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) generally provides that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under that act, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approved phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the

Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product Nix, a topical pediculicide and ovicide for single-application treatment of infestation with *Pediculus Humanus* var. *capitis* (head louse) and its nits (eggs). Following FDA's approval, National Research Development Corp. filed a patent term restoration application with the U.S. Patent and Trademark Office, which then requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated June 27, 1986, FDA advised the Patent Office that the product had undergone a regulatory review period and that Nix represented the first commercial marketing or use of its active ingredient, permethrin. Shortly thereafter, the Patent Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for Nix is 1,068 days. Of this time, 671 days occurred during the testing phase of the regulatory review period, while 397 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act became effective:* April 30, 1983. FDA has verified that the investigational new drug application became effective on April 30, 1983 (30 days after its receipt by the agency; see 21 CFR 312.1(b)(4)).

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the Federal Food, Drug, and Cosmetic Act:* February 28, 1985. FDA has verified that the new drug application (NDA 19-435) was initially submitted on February 28, 1985.

3. *The date the application was approved:* March 31, 1986. FDA has verified that NDA 19-435 was approved on March 31, 1986.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension,

this applicant seeks 732 days of patent extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before September 30, 1986, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before January 27, 1987, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, Part 1, 98th Cong., 2d Sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: June 24, 1986.

Stuart L. Nightingale,

Associate Commissioner for Health Affairs.

FR Doc. 86-17364 Filed 7-31-86; 8:45 am]

BILLING CODE 4160-01-M

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### Office of the Secretary

[Docket No. D-86-820]

### Delegation of Authority to the Assistant Secretary for Public and Indian Housing for Approval or Disapproval of Public Housing Agency Requests for Conversion of Public Housing

AGENCY: Department of Housing and Urban Development, Office of the Secretary.

ACTION: Delegation of authority to the Assistant Secretary for Public and Indian Housing for approval or disapproval of requests for conversion of public housing, with the authority to redelegate to Regional Administrators.

EFFECTIVE DATE: July 24, 1986.

FOR FURTHER INFORMATION CONTACT: Nancy Chisholm, Director, Policy Staff, Office of the Assistant Secretary for Public and Indian Housing, Room 4118, Department of Housing and Urban Development, 451 Seventh Street, SW.,



Washington, DC 20410. Telephone (202) 755-6713 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:** Under Part I of the Annual Contributions Contract (ACC) between a PHA and HUD, a PHA must obtain prior HUD approval for the conversion (permanent change of bedroom size, family/elderly occupancy type or dwelling/non-dwelling status) of public housing. The Secretary is delegating to the Assistant Secretary for Public and Indian Housing authority to disapprove or approve any PHA request for conversion of public housing.

Accordingly, the Secretary delegates as follows:

*Section A. Authority delegated.*

Authority to disapprove or approve any PHA request for conversion of public housing.

*Section B. Authority to redelegate.*

All or any part of the authority delegated to the Assistant Secretary for Public and Indian Housing in Section A may be redelegated to any Regional Administration.

**Authority:** Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: July 24, 1986.

Samuel R. Pierce, Jr.,

Secretary.

[FR Doc. 86-17405 Filed 7-31-86; 8:45 am]

BILLING CODE 4210-32-M

[Docket No. D-86-821]

**Redelegation of Authority to Regional Administrators for Approval or Disapproval of Public Housing Agency Requests for Demolition, Disposition or Conversion of Public Housing**

**AGENCY:** Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing.

**ACTION:** Redelegation of authority to Regional Administrators for approval or disapproval of requests by Public Housing Agencies for demolition, disposition or conversion of public housing.

**SUMMARY:** The Assistant Secretary for Public and Indian Housing is redelegating to the Regional Administrators disapproval authority and limited approval authority for public housing agency (PHA) requests for the demolition, disposition or conversion of public housing, with the authority to redelegate further to the Field Office Managers.

**EFFECTIVE DATE:** July 24, 1986.

**FOR FURTHER INFORMATION CONTACT:** Nancy Chisholm, Director, Policy Staff, Office of the Assistant Secretary for Public and Indian Housing, Room 4118, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Telephone (202) 755-6713 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:** Under applicable HUD regulations (24 CFR Part 970), a PHA must obtain prior HUD approval for the demolition or disposition of public housing. Under Part I of the Annual Contributions Contract (ACC) between a PHA and HUD, a PHA must obtain prior HUD approval for the conversion (permanent change of bedroom size, family/elderly occupancy type or dwelling/nondwelling status) of public housing. The Assistant Secretary for Public and Indian Housing is redelegating to the Regional Administrators authority: (1) To disapprove any PHA request for demolition, disposition or conversion; and (2), except to the extent that more than a specified number of dwelling units may be involved, to approve any such request. Each Regional Administrator is authorized to redelegate all or any part of such authority to any Field Office Manager. Approval authority for demolition, disposition or conversion of more than the specified number of dwelling units is reserved to the Assistant Secretary for Public and Indian Housing.

Accordingly, the Assistant Secretary for Public and Indian Housing redelegates as follows:

*Section A. Authority redelegated.*

The following authority for decisions on PHA requests for the demolition or disposition of public housing, under 24 CFR Part 970, is redelegated to Regional Administrators:

(1) Authority to disapprove any such request; or

(2) Authority to approve any such request for the following actions:

(a) Demolition or disposition of not more than 100 dwelling units, or 20 percent of the total of dwelling units of a particular project, whichever number is fewer; provided that, for a particular project, this limitation shall apply cumulatively, counting all units in the project that were previously approved by HUD for demolition or disposition.

(b) Demolition or disposition of nondwelling structures.

(c) Disposition of utility systems.

(d) Disposition of non-fee interests in real estate, such as easements, rights-of-way, mineral leases or other leasehold interests.

(e) Disposition of not more than 10 acres of land, whether vacant or

occupied by structures or systems within the limits stated in paragraphs (2)(a) through (d) of this section.

The following authority for decisions on PHA requests for conversion of public housing, under Part I of the ACC, is redelegated to Regional Administrators:

(1) Authority to disapprove any request; or

(2) Authority to approve conversion of 100 dwelling units, or 20 percent of the dwelling units in a particular project, whichever number is fewer; provided that, for a particular project, this limitation shall apply cumulatively since the first such request for the project. The Regional Administrator may not approve requests which shall result in the reduction in one half or more of the three-bedroom or larger units.

*Section B. Authority to redelegate.*

All or any part of the authority redelegated to a Regional Administrator under Section A may be further redelegated to any Field Office Manager.

*Section C. Authority reserved.*

All authority for the approval of demolition, disposition or conversion of public housing exceeding the limitations stated in Section A is reserved to the Assistant Secretary for Public and Indian Housing.

Dated: July 24, 1986.

**Authority:** Delegation of authority from the Secretary to the Assistant Secretary for Public and Indian Housing, effective September 7, 1983, 48 FR 41097, dated September 13, 1983; delegation of authority from the Secretary to the Assistant Secretary for Public and Indian Housing, effective July 24, 1986, dated July 24, 1986.

James E. Baugh,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 86-17406 Filed 7-31-86; 8:45 am]

BILLING CODE 4210-33-M

**Office of Administration**

[Docket No. N-86-1624]

**Submission of Proposed Information Collection to OMB**

**AGENCY:** Office of Administration, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is



soliciting public comments on the subject proposal.

**DATE:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Robert Fishman, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** David S. Cristy, Reports Management Officer Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. **SUPPLEMENTARY INFORMATION:** The Department has submitted the proposal described below for the collection of information to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the agency form number, if applicable; (4) how frequently information submissions will be required; (5) what members of the public will be affected by the proposal; (6) an estimate of the total number of hours needed to prepare the information submission; (7) whether the proposal is new or an extension or reinstatement of an information collection requirement; and (8) the names of telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Copies of the proposed forms and other available documents submitted to OMB may be obtained from David S. Cristy, Reports Management Officer for the Department. His address and telephone number are listed above. Comments regarding the proposal should be sent to the OMB Desk Officer at the address listed above.

The proposed information collection requirement is described as follows:

#### Submission of Proposed information Collection to OMB

##### Proposal

Income Limits with Respect to, Admission to, and Occupancy of, Lower-Income Public Housing Owned by Public Housing Agencies or Leased by Public Housing Agencies from Private Owners, 24 CFR 960.

Office: Public and Indian Housing  
Form Number: None  
Frequency of Submission: On Occasion  
Affected Public: State of Local Governments  
Estimated Burden Hours: 4,200

Status: New

Contact: Joyce Anne Bassett, HUD, (202) 426-1744; Robert Fishman, OMB, (202) 295-6880

Dated: July 24, 1986.

##### Proposal

Title I Transfer of Mobile Home Loans to GNMA Pool.

Office: Administration  
Form Number: HUD-676  
Frequency of Submission: On Occasion  
Affected Public: Businesses or Other For-Profit  
Estimated Burden Hours: 1,250  
Status: Extension  
Contact: Cynthia Palmer, HUD, (202) 755-5263; Robert Fishman, OMB, (202) 395-6880

Dated: July 24, 1986.

##### Proposal

Broker's Accounting Reports  
Office: Administration  
Form Number: HUD-2700, 2700a, 2700b, and 2751  
Frequency of Submission: Monthly  
Affected Public: Businesses or Other For-Profit  
Estimated Burden Hours: 18,384  
Status: Extension  
Contact: Adolph R. Platt, HUD, (202) 755-5156; Robert Fishman, OMB, (202) 395-6880

Dated: July 24, 1986.

##### Proposal

Fiscal Information—Military Acquisition  
Office: Administration  
Form Number: HUD-2706  
Frequency of Submission: On Occasion  
Affected Public: Businesses or Other For-Profit  
Estimated Burden Hours: 150  
Status: Extension  
Contact: Adolph R. Platt, HUD, (202) 755-5156; Robert Fishman, OMB, (202) 395-6880  
Dated: July 24, 1986.

##### Proposal

Survey of Pension Funds  
Office: Housing  
Form Number: None  
Frequency of Submission: Quarterly  
Affected Public: State or Local Governments, Businesses or Other For-Profit, and Small Businesses or Organizations  
Estimated Burden Hours: 84  
Status: Extension  
Contact: John N. Dickie, HUD, (202) 755-7270; Robert Fishman, OMB, (202) 395-6880

Dated: July 21, 1986.

Authority: Sec. 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Sec. 7(d) of the Department of Housing and Urban Development Act 42 U.S.C. 3535(d).

Donald J. Keuch, Jr.,  
Deputy Assistant Secretary.  
[FR Doc. 86-17407 Filed 7-31-86; 8:45 am]  
BILLING CODE 4210-01-M

#### Office of Environment and Energy

[Docket No. E-86-139]

#### Intended Environmental Impact Statement; Detroit, MI

The Department of Housing and Urban Development gives notice that an Environmental Impact Statement (EIS) is intended to be prepared by the City of Detroit, Michigan, for the expansion of the Jefferson-Conner Industrial Revitalization Project under the HUD programs described in the appendix to this Notice. This Notice is required by the Council of Environmental Quality under its rule (40 CFR 1500).

Interested individuals, governmental agencies, and private organizations are invited to submit information and comments concerning the project to the specific person or address indicated in the appropriate part of the appendix.

Particularly solicited is information on reports or other environmental studies planned or completed in the project area, major issues and data which the EIS should consider, and recommended mitigating measures and alternatives associated with the proposed project. Federal agencies having jurisdiction by law, special expertise or other special interests should report their interests and indicate their readiness to aid the EIS effort as a "cooperating agency."

This Notice shall be effective for one year. If one year after the publication of the Notice in the Federal Register a Draft EIS has not been filed on a project, then the Notice for that project shall be cancelled. If a Draft EIS is expected more than one year after the publication of the Notice in the Federal Register, then a new and updated Notice of Intent will be published.

Issued at Washington, DC, date July 29, 1986.

Dorothy S. Williams,  
Acting Director, Office of Environment and Energy.

#### Appendix—EIS on the Jefferson-Conner Industrial Revitalization Project

The City of Detroit, Michigan, intends to prepare an Environmental Impact Statement for the Jefferson-Conner Industrial Revitalization Project and



solicits information and comments for consideration in the EIS.

**Description:** The proposed project involves the demolition and complete, phased reconstruction of an existing, obsolete automobile assembly plant and conversion of the plant into a 1.9 million square foot assembly plant for trucks and other vehicles.

Included in the project is the provision of additional land adjacent to the plant for suppliers, and construction of new rail facilities, utilities, and roadways. The project area, including rail facilities and roadways, is bounded generally by St. Jean Avenue, Mack Avenue, Algonquin Avenue, Conner Avenue extended to Warren Avenue, and Freud Avenue. The estimated cost of the proposed project is approximately \$1.4 billion.

Federal funding for the project is expected to be from the U.S. Department of Housing and Urban Development, Urban Development Action Grant Program, the U.S. Department of Transportation, and Economic Development Administration.

**Need:** A decision to prepare an EIS has been based upon the large-scale nature of the project in a dense urban setting and the possible impacts on air quality, relocation of persons and businesses, solid/hazardous waste management, historical resources, and transportation systems.

**Alternatives:** Alternatives being considered include:

- No action,
- Renovation of the existing plant, or portions thereof, for other auto-related purposes,
- The proposed action (complete reconstruction of the plant and related rail and roadway construction),
- A small size expansion (expansion of building space without expansion of the existing site), and
- A different site within the City of Detroit.

**Scoping:** Responses to this Notice will be used to:

- Help determine significant environmental issues,
- Identify data that will be used in the EIS, and
- Identify agencies, groups, and individuals that will participate in the EIS process.

A public scoping meeting will be held approximately ten (10) days after publication of this Notice in the *Federal Register* at a place and time to be announced later in the local newspaper.

**Comments:** Submission of comments and information either in writing or by telephone, relating to the scoping meeting or this Notice should be directed to: Mr. Thomas Andrews,

Detroit Planning Department, 3400 Cadillac Tower, Detroit, Michigan 48226. Telephone: (313) 224-6380.

[FR Doc. 86-17408 Filed 7-31-86; 4:45 am]

BILLING CODE 4210-29-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[NV-930-06-4333-11]

#### Battle Mountain District; Shoshone-Eureka Resource Area

**AGENCY:** Bureau of Land Management, Department of Interior.

**ACTION:** Establishment of camping stay limit for public lands administered by the BLM in the Battle Mountain District, Nevada.

**SUMMARY:** Person(s) may occupy a site or multiple sites within a five (5) mile radius on public lands not closed or otherwise restricted to camping within the Battle Mountain District for a total period of not more than fourteen (14) days during any twenty eight (28) day period. Following the fourteen (14) day period, persons may not relocate within a distance of five (5) miles of the site that was just previously occupied until completion of the twenty eight (28) day period. The fourteen (14) day limit may be reached either through a number of separate visits or through a period of continuous occupations of a site. Under special circumstances and upon request, the authorized officer may give permission for extension to the fourteen (14) day limit.

Additionally, no person may leave personal property unattended in designated campgrounds, recreation developments or elsewhere on public lands within the Battle Mountain District for a period of more than forty-eight (48) hours without written permission from the authorized officer.

**DATE:** This camping stay limit will be effective immediately upon publication in the *Federal Register*.

#### FOR FURTHER INFORMATION CONTACT:

Terry Plummer, District Manager, Battle Mountain District Office, North Second and Scott Streets, P.O. Box 1420, Battle Mountain, Nevada 89820, telephone (702) 635-5181.

**SUPPLEMENTARY INFORMATION:** This camping stay limit is being established in order to assist the Bureau in reducing the incidence of long-term occupancy trespass being conducted under the guise of camping on public lands within the Battle Mountain District. Of equal importance is the problem of long-term camping, which precludes equal

opportunities for other members of the public to camp in the same area, which creates user conflicts.

Authority for this stay limit is contained in CFR Title 43, Chapter II, Part 8365, Subpart 8365.1-2, 8365.1-6, and 8365.2-3.

Michael C. Mitchel,

Acting District Manager.

[FR Doc. 86-17306 Filed 7-31-86; 8:45 am]

BILLING CODE 4310-HC-M

#### Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestion on the requirement should be made within 30 days directly to the Bureau clearance officer and to the Office of Management and Budget Interior Department Desk Officer, Washington, D.C. 20503, telephone 202-395-7340.

Title: Wildfire Prevention Permit, 43 CFR Part 9210

**Abstract:** The permit is a procedure by which BLM may authorize the permittee to enter public lands during a closure or restricted use of an area to perform the permitted activity. Entrance is not allowed, unless by a written permit

Bureau Form Number: 9210-52

Frequency: On occasion

Description of Respondents: Individuals needing access to restricted areas because of high wildlife danger; generally local residents

Annual Responses: 1,000

Annual Burden Hours: 84

Bureau clearance officer: Rebecca Daughtery, (202) 653-8800.

James Parker,

Assistant Director, Support Services.

June 3, 1986.

[FR Doc. 86-17331 Filed 7-31-86; 8:45 am]

BILLING CODE 5691-90-M

#### Availability of Environmental Impact Statement, Salt Lake District

**SUMMARY:** The Bureau of Land Management's Salt Lake District and the U.S. Air Force announce the availability of the Final Environmental Impact



Statement for the West Desert Pumping Project. This document discusses the impacts of granting rights-of-way to the State of Utah for construction of a system of dikes and ponds for evaporation of excess water from the Great Salt Lake.

**ADDRESSES:** Copies of the West Desert Pumping FEIS may be obtained from your local public library or by writing Jack Peterson, Bureau of Land Management, Salt Lake District, 2370 South 2300 West, Salt Lake City, Utah 84119.

Deane Zeller,  
District Manager.

[FR Doc. 86-17308 Filed 7-31-86; 8:45 am]

BILLING CODE 4310-DQ-M

## INTERSTATE COMMERCE COMMISSION

### Forms Under Review by Office of Management and Budget

The following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) is being submitted to the Office of Management and Budget for review and approval. Copies of the forms and supporting documents may be obtained from the Agency Clearance Officer, Ray Houser (202) 275-6723. Comments regarding this information collection should be addressed to Ray Houser, Interstate Commerce Commission, Room 1325, 12th and Constitution Ave., NW., Washington, DC 20423 and to Gary Waxman, Office of Management and Budget, Room 3228 NEOB, Washington, DC 20503, (202) 395-7340.

Type of Clearance: Reinstatement  
Bureau/Office: Bureau of Accounts  
Title of Form: Annual Report of Class I & II Motor Carriers of Property  
OMB Form No.: 3120-0032  
Agency Form No.: Form M  
Frequency: Annually  
Respondents: Class I & II Motor Carrier of Property  
No. of Respondents: 2,606  
Total Burden Hrs: 119,876

Type of Clearance: Reinstatement  
Bureau/Office: Bureau of Accounts  
Title of Form: Annual Report of Class I & II Motor Carrier of Household Goods  
OMB Form No.: 3120-0033  
Agency Form No.: Form M-H  
Frequency: Annually  
Respondents: Class I & II Motor Carrier of Household Goods  
No. of Respondents: 163  
Total Burden Hrs: 5,705

Type of Clearance: Reinstatement  
Bureau/Office: Bureau of Accounts  
Title of Form: Uniform System of Accounts—Motor Carriers of Property  
OMB Form No.: 3120-0106  
Agency Form No.: Form N/A  
Frequency: Quarterly/Annually  
Respondents: Motor Carriers of Property  
No. of Respondents: 2,606  
Total Burden Hrs: 367,446

Noreta R. McGee,  
Secretary.  
[FR Doc. 86-17338 Filed 7-31-86; 8:45 am]

BILLING CODE 7035-01-M

### Intent To Engage In Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

A. 1. The Parent Corporation and its address is as follows: Deep Sea Foods, Inc.

Also doing business as:

Deep Sea Marine Services  
Deep Sea Foods Freezer  
Deep Sea Marine Products  
Deep Sea Oil Company  
Deep Sea Marine Dock  
Address: 600 Shelt Belt Road, Bayou La Batre, Al. 36509

2. Wholly-Owned Subsidiaries and State of Incorporation:

- (i) Bayou Oil Company, Inc.—State of Alabama
- (ii) Deep Sea Boats, Inc.—State of Alabama
- (iii) Deep Sea Boatbuilders, Inc.—State of Alabama

B. 1. Parent corporation and address of principal office: Green Forest Lumber (International) Limited, 194 Merton Street, Toronto, Ontario, M4S 3B5

2. Wholly-owned subsidiaries which will participate in the operations, and place of incorporation:

- A. Green Forest Lumber Limited  
Incorporated in Ontario, Canada
- B. Chapleau Lumber Mill Inc.,  
Incorporated in Ontario, Canada
- C. 673764 Ontario Limited, Incorporated in Ontario, Canada

The above subsidiaries all have a mailing address of 194 Merton Street, Toronto, Ontario M4S 3B5.

C. 1. Parent corporation and address of principal office: Jim Smith Contracting Co., Inc., Route 1, P.O. Box 27, Grand Rivers, Kentucky 42045

2. Wholly-owned subsidiaries which will participate in the operations, and State of Incorporation: J. Riley Trucking Co., Inc. Kentucky.

D. 1. Parent corporation and address

of principal office: Mill Creek Mining Company, 402 Indiana Theatre Building, 638 Philadelphia Street, Indiana, Pennsylvania 15701

2. Wholly-owned subsidiaries which will participate in the operations, and State of Incorporation:

- (i) Doan Mining Company, 402 Indiana Theatre Building, 638 Philadelphia Street, Indiana, Pennsylvania 15701, a Pennsylvania Corporation.
- (ii) Doan Trucking Company, 402 Indiana Theatre Building, 638 Philadelphia Street, Indiana, Pennsylvania 15701, a Pennsylvania Corporation.

Noreta R. McGee,  
Secretary.

[FR Doc. 86-17336 Filed 7-31-86; 8:45 am]

BILLING CODE 7035-01-M

### Regional Motor Carrier Boards, Appointment of Members

Acting under 49 U.S. Code, section 10305:

*It is ordered:* That the incumbents of the following positions be appointed as members of the Regional Motor Carrier Boards in each of the three regions:

- Assistant to the Regional Director (Chairman)
- Supervisor, Complaint and Authority Center
- Transportation Industry Analyst, Complaint and Authority Center

These appointments are necessitated by the reorganization of the Office of Compliance and Consumer Assistance, which becomes effective August 1, 1986. Notice of the reorganization was published at 51 FR 25206 and 25265, July 11, 1986.

Decided: July 22, 1986.

Heather J. Gradison,  
Chairman.

[FR Doc. 86-17337 Filed 7-31-86; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub-No. 177)A]

### Seaboard System Railroad, Inc.; Findings on Abandonment Between Wheeler and Ewing, VA

The Commission has issued a certificate authorizing Seaboard System Railroad, Inc., to abandon its 12.5-mile rail line between Wheeler (milepost CV-222.5) and Ewing, VA (milepost CV-235). The abandonment certificate will become effective 30 days after this publication unless the Commission also finds that: (1) A financially responsible person has offered financial assistance



(through subsidy or purchase) to enable the rail service to be continued; and (2) it is likely that the assistance would fully compensate the railroad.

Any financial assistance offer must be filed with the Commission and the applicant no later than 10 days from publication of this Notice. The following notation shall be typed in bold face on the lower left-hand corner of the envelope containing the offer: "Rail Section, AB-OFA." Any offer previously made must be remade within this 10 day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.27.

By the Commission, Jane F. Mackall,  
Director, Office of Proceedings.  
Noreta R. McGee.

Secretary.

[FR Doc. 86-17339 Filed 7-31-86; 8:45 am]

BILLING CODE 7035-01-M

## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### Reimbursable Services-Excess Cost of Preclearance Operations

Notice is hereby given that pursuant to Immigration and Naturalization Service Regulations (8 CFR 235.5(c)), the biweekly reimbursable excess costs for each preclearance installation are determined as set forth below and will be effective with the pay period beginning August 3, 1986.

Installation	Biweekly excess cost
Montreal, Canada.....	\$11,093.74.
Toronto, Canada.....	15,036.86.
Kindley Field, Bermuda.....	2,214.12.
Freeport, Bahama Islands.....	7,150.59.
Nassau, Bahama Islands.....	8,809.16.
Calgary, Canada.....	4,859.36.
Edmonton, Canada.....	2,861.49.
Vancouver, Canada.....	8,426.43.
Victoria, Canada.....	3,580.14.
Winnipeg, Canada.....	1,343.10.

These amounts will be in effect and billed biweekly until the first full pay period after the next notice of reimbursable biweekly excess costs is published in the Federal Register.

Dated: July 29, 1986.

Malcolm E. Arnold,

Comptroller.

FR Doc. 86-17370 Filed 7-31-86; 8:45 am]

BILLING CODE 4410-10-M

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Job Training Partnership Act; Uses of Section 202(b)(3) Within-State Incentive Grants (So-Called Six Percent Funds)

AGENCY: Employment and Training Administration, Labor.

ACTION: Extension of comment period on notice of proposed policy.

SUMMARY: The Department of Labor will extend the comment period for thirty days on the proposed policy clarification regarding the use of Job Training Partnership Act (JTPA) section 202 (b)(3) within-State incentive grants (so-called six-percent funds) for purposes set forth in JTPA. Such funds are not to be used for management information systems or post-program data collection or other activities that are appropriately chargeable to administration.

DATE: Comments must be submitted on or before September 2, 1986.

ADDRESS: Submit comments to: Assistant Secretary for Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Dr. Fred Romero, Administrator, Office of Strategic Planning and Policy Development.

FOR FURTHER INFORMATION CONTACT: Mr. Herman Williams, Telephone (202) 535-0687.

SUPPLEMENTARY INFORMATION: On June 4, 1986, the Department of Labor (Department) published a proposed policy in the Federal Register at 51 FR 20362. This policy would preclude States from using within-State incentive grants (six-percent funds) for any purpose beyond those specifically set forth at section 202 (b)(3) of the Job Training Partnership Act (JTPA). Interested parties were invited to submit written comments through June 19, 1986.

Some of the commenters indicated that there was insufficient time allowed to comment completely on the proposed policy. Additionally, Congress is in the process of considering amendments to JTPA that may have a direct bearing on this policy. In view of these developments the comment period has been extended for thirty days from the date of this notice. This will provide ample time for the system to respond to the proposed policy and to await any statutory revisions that may likewise affect the Department's final policy determination.

Signed at Washington, DC, this 28th day of July, 1986.

Roberts T. Jones,

Deputy Assistant Secretary of Labor.

[FR Doc. 86-17323 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-30-M

### Employment Standards Administration, Wage and Hour Division

#### Minimum Wages for Federal and Federally-Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be



impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S-3504, Washington, DC 20210.

#### Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

##### Volume I

New York:  
NY86-2 (Jan. 3, 1986) ..... pp. 645-659; pp. 659a-659b.

Pennsylvania:  
PA86-12 (Jan. 3, 1986) ..... p. 887.

##### Volume II

Arkansas:  
AR86-2 (Jan. 3, 1986) ..... pp. 6-9.

Colorado:  
CO86-1 (Jan. 3, 1986) ..... pp. 97-98.

Iowa:  
IA86-1 (Jan. 3, 1986) ..... pp. 24-25.

Do.	
IA 86-2 (Jan. 3, 1986) .....	pp. 28-31.
Louisiana:	
LA86-5 (Jan. 3, 1986) .....	pp. 360, 363, p. 366, pp. 377-378.
Missouri:	
MO86-2 (Jan. 3, 1986) .....	p. 559, pp. 561-563.
Missouri:	
MO86-3 (Jan. 3, 1986) .....	p. 569.
Missouri:	
MO86-4 (Jan. 3, 1986) .....	p. 576.
Missouri:	
MO86-5 (Jan. 3, 1986) .....	p. 579.
Missouri:	
MO86-6 (Jan. 3, 1986) .....	p. 583.
Missouri:	
MO86-7 (Jan. 3, 1986) .....	p. 590.
Missouri:	
MO86-8 (Jan. 3, 1986) .....	p. 595.
Missouri:	
MO86-9 (Jan. 3, 1986) .....	pp. 598-601, p. 603.
Missouri:	
MO86-10 (Jan. 3, 1986) .....	p. 606.
Missouri:	
IL86-11 (Jan. 3, 1986) .....	p. 611.
Listing by location (index) .....	pp. xv, xxi.
Volume III	
Oregon:	
OR 86-1 (Jan. 3, 1986) .....	pp. 257-258, p. 260.
Washington:	
WA 86-1 (Jan. 3, 1986) .....	pp. 299-300, p. 304.
Washington:	
WA86-2 (Jan. 3, 1986) .....	pp. 328-330.
Washington:	
WA86-3 (Jan. 3, 1986) .....	p. 339.
Washington:	
WA86-5 (Jan. 3, 1986) .....	p. 356.
Washington:	
WA86-6 (Jan. 3, 1986) .....	p. 360.
Washington:	
WA86-7 (Jan. 3, 1986) .....	p. 362.
Washington:	
WA86-8 (Jan. 3, 1986) .....	p. 365b.
Washington:	
WA86-9 (Jan. 3, 1986) .....	p. 365f.

#### General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts". This publication is available at each of the 80 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest,

since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. The subscription cost is \$277 per volume. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the State covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, D.C. this 25th day of July 1986.

James L. Valin,

Assistant Administrator.

[FR Doc. 86-17086 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-27-M

#### Mine Safety and Health Administration

[Docket File No. M-86-80-C]

#### M&J Coal Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

M&J Coal Company, Inc., 1499 Barry Street, Fairmont, West Virginia 26554 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its No. 1 Mine (I.D. No. 46-06225) located in Marion County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A. summary of the petitioner's statements follows:

1. The petition concerns the use of a locked padlock to secure battery plugs to machine-mounted battery receptacles on permissible, mobile battery-powered machines.

2. As an alternate method, petitioner proposes to use a spring-loaded locking device in lieu of padlocks. The spring-loaded device will be designed, installed and used to prevent the threaded rings that secure the battery plugs to the battery receptacles from unintentionally loosening and will be attached to prevent accidental loss. In addition, the fabricated metal brackets will be securely attached to the battery receptacles to prevent accidental loss of the brackets.

3. Petitioner states that the spring-loaded metal locking devices will be easier to maintain than padlocks because there are no keys to be lost and dirt cannot get into the workings as with a padlock.

4. Operators of permissible, mobile, battery-powered machines affected by this modification will be trained in the proper use of the locking device, the hazards of breaking battery-plug



connections under load, and the hazards of breaking battery-plug connections in areas of the mine where electric equipment is required to be permissible.

5. For these reasons, petitioner requests a modification of the standard.

#### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variance, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 2, 1986. Copies of the petition are available for inspection at that address.

Dated: July 4, 1986.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 86-17388 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-85-C]

#### Omega Mining Co., Inc.; Petition for Modification of Application of Mandatory Safety Standard

Omega Mining Company, Inc., P.O. Box 3186, Morgantown, West Virginia 26503 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Omega Mine No. 100 (I.D. No. 46-06470) located in Monongalia County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the use of a locked padlock to secure battery plugs to machine-mounted battery receptacles on permissible, mobile battery-powered machines.

2. As an alternate method, petitioner proposes to use a metal bracket and a metal locking device (harness snap) in lieu of padlocks. The metal locking device will be designed, installed and used to prevent the threaded rings that secure the battery plugs to the battery receptacles from unintentionally loosening. In addition, the locking device and the fabricated metal brackets will be securely attached to prevent accidental loss.

3. Petitioner states that the metal locking devices will be easier to maintain than padlocks because there are no keys to be lost and dirt cannot get into the workings as with a padlock.

4. Operators of permissible, mobile, battery-powered machines affected by this modification will be trained in the proper use of the locking device, the hazards of breaking battery-plug connections under load, and the hazards of breaking battery-plug connections in areas of the mine where electric equipment is required to be permissible.

5. For these reasons, petitioner requests a modification of the standard.

#### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 2, 1986. Copies of the petition are available for inspection at that address.

Dated: July 24, 1986.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 86-17389 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-86-95-C]

#### Utah Fuel Co.; Petition for Modification of Application of Mandatory Safety Standard

Utah Fuel Company, P.O. Box 719, Helper, Utah 84526 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Skyline No. 3 Mine (I.D. No. 42-01566) located in Carbon County, Utah. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that return aircourses be examined in their entirety on a weekly basis.

2. Petitioner states that due to roof falls portions of the return entries cannot be travelled, and rehabilitation of these areas would expose miners to hazardous conditions.

3. The roof falls have not impeded the air flow in the mine. There are no electrical ignition sources present in the fall areas and methane has not been detected in the mine.

4. As an alternate method petitioner proposes to establish check points to monitor airflow and rest for methane. All checks would be made by a certified

person and the results would be kept in a log at the check points.

5. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

#### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 2, 1986. Copies of the petition are available for inspection at that address.

Dated: July 25, 1986.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 86-17390 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-43-M

#### Occupational Safety and Health Administration

##### Iowa State Standards; Approval

1. *Background.* Part 1953 of Title 29, Code of Federal Regulations prescribes procedures under section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (hereinafter called the Act) by which the Regional Administrators for Occupational Safety and Health (hereinafter called the Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On July 20, 1973, notice was published in the Federal Register (38 FR 19368) of the approval of the Iowa plan and the adoption of subpart J of Part 1952 containing the decision.

The Iowa plan provides for the adoption of Federal standards (by reference after comments and public hearing). By letter dated June 27, 1986 from Walter H. Johnson, Deputy Commissioner of Labor to Alonzo I. Griffin, Area Director, and incorporated as part of the plan, the State submitted State standards comparable to: Educational/Scientific Diving, Subpart T, 29 CFR 1910.401 (Appendix B) as published in the Federal Register (50 FR



1050 dated January 9, 1985); Occupational Exposure to Ethylene Oxide; Change in Effective Date and Approval of Information Collection Requirements, 29 CFR 1910.1047(m) as published in the *Federal Register* (50 FR 9800 dated March 12, 1985); Flammable and Combustible Liquids, 29 CFR 1910.106 (b)(2)(iv)(f) as published in the *Federal Register* (50 FR 36992 dated September 11, 1985); Coke Oven Emissions Standard; Conforming Deletions, 29 CFR 1910.1029(f)(1)(b), (f)(1)(ii)(b), (f)(6)(iii), and (g)(4)(i) as published in the *Federal Register* (50 FR 37353 dated September 13, 1985). These standards which are contained in Chapter 88 of the Code of Iowa (1983) were promulgated after public comment requested on October 4, 1985, hearing held on November 13, 1985 and resolution adopted by the Iowa Bureau of Labor on December 30, 1985 pursuant to Chapter 17a, Iowa Code. The standards were effective on February 19, 1986 and notice of their adoption was published by the State on January 15, 1986.

2. *Decision.* Having reviewed the State submission in comparison with the Federal standards it has been determined that the State standards are identical to the comparable Federal standards and should therefore be approved.

3. *Location of supplement for inspection and coping.* A copy of the standards supplement along with the approved plan, may be inspected and copied during normal business hours at the following locations: Directorate of Federal/State Operations, Office of State Programs, Room N3476, 200 Constitution Avenue, NW., Washington, DC 20210; Office of the Regional Administrator, OSHA, Room 406 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106; and Iowa Bureau of Labor, 307 E. 7th Street, Des Moines, Iowa 50319.

4. *Public participation.* Under 29 CFR 1953.2(c) of this Chapter, the Assistant Secretary may prescribe alternative procedures to expedite the review process or for other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Iowa State plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reasons:

1. The standards are identical to the comparable Federal standards and are therefore deemed to be at least as effective.

2. The standards were adopted in accordance with the procedural

requirements of State law and further public participation and notice would be unnecessary.

This decision is effective August 1, 1986.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at Kansas City, Missouri this 10th day of July 1986.

Roger A. Clark,  
Regional Administrator.

[FR Doc. 86-17391 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-26-M

### **Pension and Welfare Benefits Administration**

[Prohibited Transaction Exemption 86-96; Exemption Application No. D-6263 et al.]

### **Grant of Individual Exemptions; Memphis Construction, Inc., et al.**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

Notices were published in the *Federal Register* of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of pendency were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the

Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### **Statutory Findings**

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

### **Employees' Profit Sharing and Retirement Plan of Memphis Construction, Inc. (the Plan) Located in Memphis, New York**

[Prohibited Transaction Exemption 86-96; Exemption Application No. D-6263]

### **Exemption**

The restrictions of section 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975 (c)(1) (A) through (E) of the Code, shall not apply to the proposed sale of certain real property by the Plan to Memphis Construction, Inc., the Plan sponsor, provided all of the terms of the proposed transaction are as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party on the date of the communication of the transaction.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 3, 1986 at 51 FR 19903.

For Further Information Contact: Linda M. Hamilton of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

### **Circleville Publishing Company Profit Sharing Plan (the Plan) Located in Circleville, Ohio**

[Prohibited Transaction Exemption 86-97; Exemption Application No. D-6517]

### **Exemption**

The restrictions of section 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale to Circleville Publishing Company, a party



in interest with respect to the Plan, of the shares of Press Properties, Inc. owned by the Plan, provided the sale price is not less than the fair market value of such shares on the date of the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 3, 1986 at 51 FR 19904.

For Further Information Contact: Mrs. Miriam Freund of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

**The Washington News Publishing Company Profit Sharing Plan (the Plan) Located in Washington Court House, Ohio**

[Prohibited Transaction Exemption 86-98; Exemption Application No. D-6520]

**Exemption**

The restrictions of section 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975 (c)(1) (A) through (E) of the Code, shall not apply to the sale to the Washington News Publishing Company, a party in interest with respect to the Plan, of the shares of Press Properties, Inc. owned by the Plan, provided the sales price is not less than the fair market value of such shares on the date of the sales.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published in June 3, 1986 at 51 FR 19905.

For Further Information Contact: Mrs. Miriam Freund of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

**The Van Wert Publishing Company Profit Sharing Plan (the Plan) Located in Van Wert, Ohio**

[Prohibited Transaction Exemption 86-99; Exemption Application No. D-6521]

**Exemption**

The restrictions of section 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale to The Van Wert Publishing Company, a party in interest with respect to the Plan, of the shares of Press Properties, Inc. owned by the Plan, provided the sales price is not less than the fair market

value of such shares on the date of the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 3, 1986 at 51 FR 19906.

For Further Information Contact: Mrs. Miriam Freund of the Department, telephone (2) 523-8194. (This is not a toll-free number.)

**The Wayne Newspaper Company Profits Sharing Plan (the Plan) Located in Logan, Ohio**

[Prohibited Transaction Exemption 86-100; Exemption Application No. D-6522]

**Exemption**

The restrictions of section 406(a) and 405 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale to the Wayne Newspaper Company, a party in interest with respect to the Plan, of the shares of Press Properties, Inc. owned by the Plan, provided the sales price is not less than the fair market value of such shares on the date of the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 3, 1986 at 51 FR 19906.

For Further Information Contact: Mrs. Miriam Freund of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

**The News-Journal Company Profit Sharing Plan (the Plan) Located in Wilmington, Ohio**

[Prohibited Transaction Exemption 86-101; Exemption Application No. D-6523]

**Exemption**

The restrictions of section 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale to The News-Journal Company, a party in interest with respect to the Plan, of the shares of Press Properties, Inc. owned by the Plan, provided the sales price is not less than the fair market value of such shares on the date of the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 3, 1986 at 51 FR 19907.

For Further Information Contact: Mrs. Miriam Freund of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

**Bear, Stearns & Co., Inc. and Custodial Trust Company**

[Prohibited Transaction Exemption 86-102; Exemption Application No. D-6633]

**Exemption**

The restrictions of sections 406(a)(1) (A) through (D) and 406(b) (1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the lending of securities to Bear, Stearns & Co., Inc. by employee benefit plans for which Custodial Trust Company (CTC) acts as directed trustee or custodian and securities lending agent and to the receipt of compensation by CTC in connection with these transactions, if the conditions incorporated in the representations set forth in the notice of pendency are met.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 23, 1986 at 51 FR 18974.

For Further Information Contact: Paul Kelly of the Department, telephone (202) 523-8196. (This is not a toll-free number.)

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/



or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 29th day of July, 1986.

Elliot I. Daniel,

*Assistant Administrator for Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor.*

[FR Doc. 86-17392 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-29-M

#### **Advisory Council on Employee Welfare and Pension Benefits Plans; Work Group Meeting**

Pursuant to the authority contained in section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, a public meeting of the Work Group on Individual Benefit Reporting and Recordkeeping of the Advisory Council on Employee Welfare and Pension Benefit Plans will be held at 9:30 a.m., August 14, 1986, at the U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-2313, Washington, DC 20210.

This four-member work group was formed by the Advisory Council to study issues relating to individual benefit reporting and recordkeeping for employee benefit pension plans covered by ERISA.

The purpose of the August 14 meeting is to discuss issues relating to individual benefit reporting and recordkeeping for employee benefit plans covered by ERISA. Individuals wishing to present their views on these issues to the work group will be invited to speak during the afternoon session of the meeting.

Individuals who would like to address the work group of the Advisory Council should submit requests on or before August 12, 1986 to Charles W. Lee, Jr., Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Room N-5677, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 523-

8753. Oral presentations will be limited to ten minutes, but an extended statement may be submitted for the record.

Signed at Washington, DC, this 29th day of May 1986.

Dennis M. Kass,

*Assistant Secretary, Pension and Welfare Benefits Administration.*

[FR Doc. 86-17393 Filed 7-31-86; 8:45 am]

BILLING CODE 4510-29-M

#### **NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES**

##### **Music Advisory Panel; Meeting**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Music Advisory Panel (Multi-Music Presenters Section) to the National Council on the Arts will be held on August 20-22, 1986, from 9:00 a.m.-6:00 p.m. in room 714 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on August 22, from 11:00 a.m.-1:00 p.m. Topics for discussion will include Policy and Guidelines.

The remaining sessions of this meeting on August 20-21, 1986, from 9:00 a.m.-6:00 p.m., and August 22, 1986 from 9:00-11:00 a.m. and 1:00-6:00 p.m., are for the purpose of Panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c) (4), (6) and (9)(b) of section 552b of Title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office for Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496 at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Mr. John H. Clark, Advisory Committee Management Officer, National

Endowment for the Arts, Washington, DC 20506, or call 202/682-5433.

John H. Clark,

*Director, Office of Council and Panel Operations, National Endowment for the Arts.*  
July 28, 1986.

[FR Doc. 86-17325 Filed 7-31-86; 8:45 am]

BILLING CODE 7537-01-M

#### **NATIONAL LABOR RELATIONS BOARD**

##### **Proposed OMB Circular A-76; Cost Comparison Study for Federal Register and Commerce Business Daily**

**AGENCY:** National Labor Relations Board, Division of Administration.

**ACTION:** Notice of OMB Circular A-76 Cost Comparison Study.

**SUMMARY:** The following activity is scheduled for review in accordance with OMB Circular A-76: NLRB Editorial Services

The A-76 procedure is to determine the cost advantages of contract vs in-house performance. Depending on the requirements of the review, the process can take 12 months or more to complete. Since the study is in the beginning phase, specifications have not yet been prepared. The study is scheduled to begin September 2, 1986. This notice is not an invitation for sealed bids or a request for proposals. When bids/proposals are desired, appropriate advertisement will be placed in the Commerce Business Daily.

**FOR FURTHER INFORMATION CONTACT:** Paul E. Long, Deputy Director of Administration, National Labor Relations Board, 1717 Pennsylvania Avenue NW., Washington, DC 20570. Telephone number (202) 254-9200.

Dated: Washington, DC, July 29, 1986.

By direction of the Board:

John C. Truesdale,

*Executive Secretary, National Labor Relations Board.*

[FR Doc. 86-17369 Filed 7-31-86; 8:45 am]

BILLING CODE 7545-01-M

#### **NUCLEAR REGULATORY COMMISSION**

[Docket No. 50-354]

**Public Service Electric & Gas Co. and Atlantic City Electric Co., Hope Creek Generating Station; Issuance of Facility Operating License**

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the



Commission or NRC) has issued Facility Operating License No. NPF-57 (License) to Public Service Electric & Gas Company and Atlantic City Electric Company (the licensees) which authorizes operation of the Hope Creek Generating Station (the facility) at reactor core power levels not in excess of 3293 megawatts thermal in accordance with the provisions of the License, the Technical Specifications and the Environmental Protection Plan. On April 11, 1986, the Commission issued Facility Operating License No. NPF-50, which authorized operation of the Hope Creek Generating Station at power levels not in excess of 164.65 megawatts thermal. Facility Operating License No. NPF-57 supersedes Facility Operating License No. NPF-50.

The Hope Creek Generating Station is a boiling water nuclear reactor located on the east shore of the Delaware River in Lower Alloways Creek Township, Salem County, New Jersey. The License is effective as of the date of issuance.

The application for the License complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in 10 CFR Chapter I which are set forth in the License. Prior public notice of the overall action involving the proposed issuance of an operating license was published in the *Federal Register* on August 10, 1983 (48 FR 36357).

The Commission has determined that the issuance of this License will not result in any environmental impacts other than those evaluated in the Final Environmental Statement since the activity authorized by the License is encompassed by the overall action evaluated in the Final Environmental Statement.

For further details with respect to this action, see (1) Facility Operating License No. NPF-57, with Technical Specifications (NUREG-1202) and the Environmental Protection Plan; (2) the report of the Advisory Committee on Reactor Safeguards, dated December 18, 1984; (3) the Commission's Safety Evaluation Report, dated October 1984 (NUREG-1048), and Supplements 1 through 6; (4) the Final Safety Analysis Report and Amendments thereto; (5) the Environmental Report and Supplements thereto; and (6) the Final Environmental Statement dated December 1984 (NUREG-1074).

These items are available for inspection at the Commission's Public Document Room located at 1717 H Street NW., Washington, DC 20555 and

in the Pennsville Public Library, 190 South Broadway, Pennsville, New Jersey 08070. A copy of Facility Operating License NPF-57 may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of BWR Licensing. Copies of the Safety Evaluation Report and Supplements 1 through 6 (NUREG-1048) and the Final Environmental Statement (NUREG-1202) may be purchased from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, or may be ordered by calling (202) 275-2060 or by writing to the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. All orders should clearly identify the NRC publication number and the requester's GPO deposit account, or VISA or MasterCard number and expiration date.

Dated at Bethesda, Maryland, this 25th day of July 1986.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,  
Director, BWR Project Directorate No. 3,  
Division of BWR Licensing.

[FR Doc. 86-17372 Filed 7-31-86; 8:45 am]

BILLING CODE 7590-01-M

## OFFICE OF PERSONNEL MANAGEMENT

### Proposed Extension of OMB Authorization for Information Collection Requirements in Standard Forms 85 and 86

**AGENCY:** Office of Personnel  
Management.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1980, title 44, U.S.C., Chapter 35, this notice announces a proposed extension of two forms which collect information from the public. Standard Form 85, Data for Nonsensitive or Non-critical-Sensitive Position, and Standard Form 86, Security Investigation Data for Sensitive Position, are completed by applicants for Federal positions throughout the Government. OPM uses the information to conduct investigations required by Executive Order 10450, Security Requirements for Government Employment, issued April 27, 1953; OMB Circular No. A-130, Management of Federal Information Resources, issued December 12, 1985; and various public laws. For copies of this proposal and the forms involved call James M. Farron, Agency Clearance Officer, on (202) 632-7714.

**DATES:** Comments on this proposal should be received within 10 working days from the date of this publication.

**ADDRESSES:** Send or deliver comments to:

James M. Farron, Agency Clearance  
Officer, U.S. Office of Personnel  
Management, 1900 E Street NW.,  
Room 6410, Washington, DC 20415  
and

Katie Lewin, Information Desk Officer,  
Office of Information and Regulatory  
Affairs, Office of Management and  
Budget, Room 3235, New Executive  
Office Building NW., Washington, DC  
20503.

### FOR FURTHER INFORMATION CONTACT:

James M. Farron, (202) 632-7714.  
U.S. Office of Personnel Management.  
Constance Horner,  
Director.

[FR Doc. 86-17371 Filed 7-31-86; 8:45 am]

BILLING CODE 6325-01-M

## PENSION BENEFIT GUARANTY CORPORATION

### Privacy Act of 1974; New System of Records

**AGENCY:** Pension Benefit Guaranty  
Corporation.

**ACTION:** Notice of new system of records  
and routine uses.

**SUMMARY:** This document provides notice that the Pension Benefit Guaranty Corporation will establish and maintain a system of records pertaining to its "call detail program" that collects and use information on the use of the Corporation's telephone system by employees and other persons. The document also provides notice of seven routine uses of information in the new system of records.

**EFFECTIVE DATE:** The new system of records and its routine uses will become effective without further notice on September 2, 1986, unless comments are received on or before that date that would result in a contrary determination and a notice is published to that effect.

**ADDRESSES:** Comments should be addressed to the Director, Corporate Policy and Regulations Department, Code 35100, Pension Benefit Guaranty Corporation, Suite 7300, 2020 K Street NW., Washington, D.C. 20006. Written comments will be available for public inspection in Suite 7100, at the above address, between the hours of 9:00 a.m. and 4:00 p.m.

**FOR FURTHER INFORMATION CONTACT:**  
Rena R. Hubbard, Special Counsel.



Corporate Policy and Regulations Department, Code 35100, Pension Benefit Guaranty Corporation, 2020 K Street NW., Washington, D.C. 20006, 202-956-5051 (202-956-5059 for TTY and TDD). These are not toll-free numbers.

**SUPPLEMENTARY INFORMATION:** The Pension Benefit Guaranty Corporation ("PBGC") is establishing a new system of records that is entitled Call Detail Records and designated as PBGC-11. This system of records will contain records relating to the assignment of telephone extension numbers and location of telephone extensions in the PBGC's telephone system, and to the use of those telephone extension to place long distance and other toll calls. The PBGC also is establishing and giving notice of seven routine uses under this system of records.

#### New System of Records

This document provides notice of the existence and character of a proposed new system of records, "PBGC-11", that is designated "Call Detail Records-PBGC." System PBGC-11 will be established and maintained by the PBGC to enable it to collect and use information relating to its employees' and other persons' use of the PBGC's telephone system, in accordance with requirements under the Privacy Act of 1974.

The PBGC has established a call detail program to help it control the costs of operating its telephone system. To this end the program will collect information about the use of the agency's telephone system for long distance and other toll calls and will attempt to assign responsibility to individual employees or other persons for particular calls. A twofold purpose for this collection of information is to deter the use of the telephone system for unofficial purposes and to recover for the agency the cost of unofficial calls. Other purposes are to assist the PBGC in choosing more efficient and cost-effective ways of communicating; in making decisions about acquiring hardware, software, and services; and in developing management strategies for using existing telecommunications capabilities more efficiently.

To the extent that the PBGC's call detail program will collect and maintain information about individuals and will be used to determine accountability for telephone usage and abuse, it will be maintained as a Privacy Act system of records.

This system of records, PBGC-11, will contain initial call detail, summarized monthly (or as needed) and annually, on paper and floppy disk; locator

information showing where in the PBGC specific telephone extensions are located; and records relating to the identification of individual employees or other persons and linking them with specific extension numbers and specific called numbers that incurred long distance or other toll charges. The information will be maintained and safeguarded in accordance with Privacy Act provisions as set forth in the description of the existence and character of System PBGC-11 set forth below.

#### Routine Uses

In general, a government agency must obtain the written consent of an individual before disclosing information about that individual from a system of records. The Privacy Act provides 12 exceptions to that basic requirement, of which one is routine uses that are for a purpose compatible with the purpose for which the information was collected. A routine use is considered "compatible" if the uses are functionally compatible as well as if they are necessary and proper.

The PBGC has previously established six General Routine Uses that may be made of the information in its systems of records, which are as follows:

1. **Routine Use—Law Enforcement:** In the event that a system of records maintained by the PBGC to carry out its functions indicates a violation or potential violation of law, whether criminal, civil or regulatory in nature, and whether arising by general statute or particular program pursuant thereto, the relevant records in the system of records may be referred to the appropriate agency, whether federal, state, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

2. **Routine Use—Disclosure When Requesting Information:** A record from this system of records may be disclosed as a routine use to a federal, state or local agency maintaining civil, criminal or other relevant enforcement information or other pertinent information, if necessary to obtain information relevant to a PBGC decision concerning the hiring or retention of an employee, the issuance of a security clearance, or the letting of a contract.

3. **Routine Use—Disclosure of Requested Information:** A record from this system of records may be disclosed to a federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of

an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

4. **Routine Use—Disclosure During and in Anticipation of Litigation:** A record from this system of records may be disclosed during litigation with the individual who is the subject of the record or his or her employer and the companies in common control with the employer. This includes disclosure to all counsel in the course of discovery or settlement negotiations and during the presentation of evidence to a court, magistrate or administrative tribunal, or during proceedings in reasonable anticipation thereof.

5. **Routine Use—Disclosure to OMB:** A record contained in this system of records will be disclosed to the Office of Management and Budget in connection with the review of private relief legislation as set forth in OMB Circular No. A-19 at any stage of the legislative coordination and clearance process as set forth in that Circular.

6. **Routine Use—Congressional Inquiries:** Disclosure may be to a congressional office from the record of an individual in response to an inquiry from the Congressional Office made at the request of that individual.

Of these General Routine Uses, all but number 5 apply to and will be incorporated by reference into the PBGC system of records, PBGC-11. In addition, the PBGC is proposing two additional routine uses for the information in its System PBGC-11. The first of these provides for routine disclosure of the information to employees, contract employees and consultants, and to labor organization officials to determine their own responsibility for telephone calls. The second provides for disclosure to the collective bargaining agent of an employee. These two routine uses in System PBGC-11 are proposed to read as follows:

1. **Records and data may be disclosed to employees, contract employees and consultants of the PBGC and to officials of the labor organization representing PBGC employees to determine their individual responsibility for telephone calls, but only to the extent that such disclosures consist of comprehensive lists of called numbers and length of calls.**

2. **Pursuant to Title VII of the Civil Service Reform Act, records from this system may be furnished to a labor organization upon its request when needed by that organization to perform properly its duties as the collective bargaining representative of PBGC employees in the bargaining unit.**



Both of the Routine Uses 1 and 2 in the proposed PBGC-11 system of records and General Routine Uses 1-4 and 6, which are proposed to be incorporated therein, are considered functionally compatible and necessary and proper uses of the information maintained in that system of records.

Section 552a(e)(11) of the Privacy Act requires that notice of an intended routine use of records by published at least 30 days prior to the implementation of the use and that the public be given an opportunity to comment. Interested persons are invited to submit written data, views, or comments on the proposed routine uses, which may be changed in light of the comments received. If no changes are made, and unless the PBGC publishes a notice to the contrary, the proposed amended routine uses will become final 30 days after publication of this notice.

(Sec. 3. Pub. L. 93-579, 88 Stat. 1896 (5 U.S.C. 552a))

Kathleen P. Utgoff,

*Executive Director, Pension Benefit Guaranty Corporation.*

#### **PBGC-11**

##### **SYSTEM NAME:**

Call Detail Records—PBGC.

##### **SYSTEM LOCATION:**

Pension Benefit Guaranty Corporation, 2020 K Street NW., Washington, D.C. 20006.

##### **CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Employees, contract employees and consultants of the PBGC and officials of the labor organization representing PBGC employees who have made long distance or other toll calls from PBGC telephones.

##### **CATEGORIES OF RECORDS IN THE SYSTEM:**

Records relating to use of PBGC telephones to place long distance and other toll calls; records indicating assignment of telephone extension numbers to employees and other covered individuals; records relating to location of telephone extensions.

##### **AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

29 U.S.C. 1302.

##### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

1. Records and data may be disclosed to employees, contract employees and consultants of the PBGC and officials of the labor organization representing PBGC employees to determine their

individual responsibility for telephone calls, but only to the extent that such disclosures consist of comprehensive lists of called numbers and length of calls.

2. Pursuant to Title VII of the Civil Service Reform Act, records from this system may be furnished to a labor organization upon its request when needed by that organization to perform properly its duties as the collective bargaining representatives of PBGC employees in the bargaining unit.

##### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN SYSTEM:**

###### **STORAGE:**

Records are maintained manually in file folders, in machine readable form, and on floppy disks.

###### **RETRIEVABILITY:**

Records are retrieved by name of employee or other covered individual or telephone extension number, or by telephone number called.

###### **SAFEGUARDS:**

Manual and machine readable records are maintained in filing cabinets or offices in areas of restricted access that are locked after office hours; floppy disks are locked in a vault with limited access in an office that is locked after office hours.

###### **RETENTION AND DISPOSAL:**

Records are retained for 3 years and then destroyed.

###### **SYSTEM MANAGER(S) AND ADDRESS:**

Manager, Office Services Division, Human Resources and Support Services Department, Pension Benefit Guaranty Corporation, 2020 K Street NW., Washington, D.C. 20006.

###### **NOTIFICATION PROCEDURES:**

Procedures are detailed in PBGC regulations: 29 CFR Part 2607.

###### **RECORD ACCESS PROCEDURES:**

Same as notification procedure.

###### **CONTESTING RECORD PROCEDURES:**

Same as notification procedure.

###### **RECORD SOURCE CATEGORIES:**

Telephone assignment records; call detail listings; private telephone billing information.

[FR Doc. 86-17376 Filed 7-31-86; 8:45 am]

BILLING CODE 7708-01-M

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 15226; (812-6363)]

### **GECMO Corporation—I; Application for Exemption From All Provisions of the Act**

July 25, 1986.

Notice is hereby given that GECMO Corporation—I ("Applicant"), 260 Long Ridge Road, Stamford, Connecticut 06902, filed an application on April 28, 1986, and an amendment thereto on July 18, 1986, for an order pursuant to section 6(c) of the Investment Company Act of 1940 ("Act"), exempting Applicant from all provisions of the Act in connection with the issuance of mortgage related securities. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below, and to the Act for the relevant provisions thereof.

According to the application, Applicant, a Delaware corporation, is wholly-owned by General Electric Real Estate Credit Corporation, also a Delaware Corporation, which in turn, is wholly-owned by General Electric Company, a New York corporation. Applicant states that it was formed for the limited purpose of issuing and selling one or more series of bonds ("Bonds") collateralized by mortgage certificates (as defined below) and certain other collateral ("Collateral") and engaging in activities incidental thereto. According to the application, the Bonds will be separately secured primarily by mortgage pass-through certificates which are fully guaranteed as to principal and interest by the Government National Mortgage Association, Mortgage Participation Certificates issued and guaranteed by the Federal Home Loan Mortgage Corporation and/or Guaranteed Mortgage Pass-Through Certificates issued and guaranteed by the Federal National Mortgage Association (collectively, "Mortgage Certificates").

Applicant states that the Bonds, will be issued pursuant to the indenture between an independent trustee ("Trustee") and Applicant, as supplemented by a supplemental indenture for each series ("Indenture"). The Indenture for each public offering will be qualified under the provisions of the Trust Indenture Act of 1939. The Mortgage Certificates securing each series of Bonds will be acquired by Applicant principally by using the net proceeds of the sale of the Bonds. All Collateral securing each series of Bonds



will be pledged to and held by the Trustee or its custodian and such Trustee will have a first lien perfected security interest in such Collateral. In addition to the Mortgage Certificates, the Collateral will include a separate collection account for each series of Bonds and may include a debt service reserve fund or other reserve fund. Applicant represents that the outstanding principal amount of the Mortgage Certificates securing a series of Bonds will be at least equal to the unpaid principal amount of such Bonds on their issue date.

Applicant asserts that it is not the type of entity that the Act was intended to regulate and that its limited activities do not require the Act's protection. In this respect, Applicant asserts that that it will exercise no investment discretion with respect to the Mortgage Certificates, except that the proceeds of the Mortgage Certificates held by the Trustee pending distribution to Bondholders may be invested in United States obligations and cash equivalents, guaranteed investment contracts and other investments meeting the requirements of the investment rating agency or agencies rating the Bonds. Applicant believes that under these circumstances, a Bondholder's risk and return will in no material respect depend upon the ability to Applicant to successfully invest and reinvest Bond proceeds. Finally, Applicant submits that the requested exemption will enhance its ability to purchase Mortgage Certificates and that the public interest will be served by expanding the sources of funds available to finance the purchase and retention of Mortgage Certificates and, thereby, the sources of funds available for the housing finance needs of the nation.

Applicant expressly consents to the following conditions with respect to the requested order:

(1) Each series of Bonds will be registered under the Securities Act of 1933 ("Securities Act"), unless offered in a transaction exempt from registration pursuant to section 4(2) of the Securities Act.

(2) The Bonds will be "mortgage related securities" within the meaning of section 3(a)(41) of the Securities Exchange Act of 1934. However, the mortgage collateral underlying the Bonds will be limited to mortgage certificates guaranteed by the Government National Mortgage Association, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

(3) If new mortgage collateral is substituted, the substitute collateral must: (i) Be of equal or better quality

than the collateral replaced; (ii) have similar payment terms and cash flow as the collateral replaced; (iii) be insured or guaranteed to the same extent as the collateral replaced; and (iv) meet the conditions set forth in paragraphs (2), (4) and (6). In addition, new collateral may not be substituted for more than 40% of the aggregate face amount of the mortgage certificates initially pledged as mortgage collateral. In no event may any new mortgage collateral be substituted for any substitute mortgage collateral.

(4) All mortgage certificates, funds, accounts or other collateral securing a series of Bonds ("bond collateral") will be held by the Trustee or on behalf of the Trustee by an independent custodian. The custodian may not be an affiliate (as the term "affiliate" is defined in Rule 405 under the Securities Act, 17 CFR 230.405) of the Applicant. The Trustee will be provided with a first priority perfected security or lien interest in and to all Bond Collateral.

(5) Each series of Bonds will be rated in one of the two highest bond rating categories by at least one nationally recognized statistical rating organization that is not affiliated with the Applicant. The Bonds will not be considered redeemable securities within the meaning of Section 2(a)(32) of the Act.

(6) No less often than annually, an independent public accountant will audit the books and records of the Applicant and, in addition, will report on whether the anticipated payments of principal and interest on the mortgage collateral continue to be adequate to pay the principal and interest on the Bonds in accordance with their terms. Upon completion, copies of the auditor's report(s) will be provided to the Trustee.

Notice is further given that any interested person wishing to request a hearing on the application may, not later than August 19, 1986, at 5:30 p.m., do so by submitting a written request setting forth the nature of the interest, the reasons for the request, and the specific issues, if any, of fact or law that are disputed, to the Secretary, Securities and Exchange Commission, Washington, DC 20549. A copy of the request should be served personally or by mail upon Applicant(s) at the address stated above. Proof of service (by affidavit or, in the case of an attorney-at-law, by certificate) shall be filed with the request. After said date, an order disposing of the application will be issued unless the Commission orders a hearing upon request or upon its own motion.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 86-17341 Filed 7-31-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-23468; File No. SR-CSE-86-5]

### **Self-Regulatory Organizations; Proposed Rule Change by the Cincinnati Stock Exchange Relating to Delisting by an Issuer**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on July 10, 1986, the Cincinnati Stock Exchange ("CSE") filed with the Securities and Exchange Commission the Proposed Rule Change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the Proposed Rule Change from interested persons.

#### **I. The Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The CSE proposes to amend Article IV, Section 3.2 of its Code of Regulations concerning the delisting of a security by an issuer. Under the proposed rule, an issuer may be delisted from the Exchange at its own request provided that it furnishes the Exchange with a certified copy of a resolution adopted by the issuer's Board of Directors authorizing the withdrawal from listing and registration on the Exchange and providing a statement setting forth the reasons and justifications for the proposed delisting. The Exchange may require the issuer to submit the proposed withdrawal to the holders of the security for their vote at a meeting for which proxies are solicited where the security is not also listed on another exchange having rules requiring submission of any delisting proposal to the security holders for approval.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

##### **A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

Under current CSE rules, an issuer that wishes to delist its security on the Exchange must first obtain approval for



such action from its shareholders at a special or annual meeting. This requirement imposes an unnecessary burden on issuers who list their securities on more than one exchange. The Proposed Rule Change seeks to remove this burden without compromising the right of shareholders to have their security listed on at least one exchange for trading purposes.

The Proposed Rule Change is consistent with Section 6(b)(5) of the Act in that it is designed to perfect a national market system and to protect investors and the public interest without unfairly discriminating between issuers.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange believes that the Proposed Rule Change will not impose any burden on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received comments on the Proposed Rule Change.

#### *III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action*

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the CSE's consents, the Commission will:

(A) By order approve such Proposed Rule Change, or

(B) Institute proceedings to determine whether the Proposed Rule Change should be disapproved.

#### *IV. Solicitation of Comments*

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the

Commission's Public Reference Section, 1100 L Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the CSE. All submissions should refer to the file number in the caption above and should be submitted by August 22, 1986.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: July 24, 1986

Jonathan G. Katz,

Secretary.

[FR Doc. 86-17340 Filed 7-31-86; 8:45 am]

BILLING CODE 2010-01-M

[Release No. 34-23469; File No. SR-NYSE-86-14]

#### **Self-Regulatory Organizations; Proposed Rule Change by New York Stock Exchange, Inc., and Request for Comment on Proposals by the New York Stock Exchange, Inc., et al.**

Pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on May 2, 1986, the New York Stock Exchange, Inc. ("NYSE") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NYSE. On June 24, 1986, the NYSE filed with the Commission Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments from interested persons on the NYSE proposed rule change as well as the proposed rule changes submitted by the American Stock Exchange, Inc. ("Amex")<sup>1</sup> and the National Association of Securities Dealers, Inc. ("NASD")<sup>2</sup> relating to listing standards for non-U.S. companies.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rules Changes**

The proposed rule change amends the NYSE's listing standards for non-U.S. companies as set forth in Section 103.00 of the NYSE Listed Company Manual.<sup>3</sup>

<sup>1</sup> The Amex proposed rule change was published for notice and comment previously in Securities Exchange Act Release No. 23064 (March 25, 1986), 51 FR 11125 (File No. SR-Amex-86-6).

<sup>2</sup> See Securities Exchange Act Release No. 22506 (October 4, 1985), 50 FR 41769 (File No. SR-NASD-85-20).

<sup>3</sup> The proposed amendments to section 103.00 of the NYSE Listed Company Manual are attached as Exhibit A.

These consist of modifications appropriate to providing U.S. investors, seeking to invest in securities of internationally respected non-U.S. companies, access to the investment opportunities afforded by the Exchange's highly-regulated securities market.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rules changes and discussed any comments it received on the proposed rules changes. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

#### *(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(1) *Purpose.* With the rapid growth and interdependence of world economies, the NYSE is prepared to retain its key role in the globalization of securities trading. However, it has been determined that some internationally respected non-U.S. companies are reluctant to enter the Exchange's securities market. While this reluctance is due to a number of factors, the chief concern related to the NYSE is its policies and requirements as to certain corporate governance practices and the reporting of interim earnings.

These policies and practices are not necessarily consistent with the laws or practices customarily observed by non-U.S. companies in their country of domicile. For example, in many foreign countries, controlling law or common practice compel or permit the non-U.S. company to issue interim earnings reports on a semi-annual, as opposed to quarterly, basis or to have a class or classes of common stock having more or less than one vote per share. Other NYSE policies concerning the corporate governance practices required of domestic companies, which may not be consistent with the home country laws or practices of non-U.S. companies, include those which address the structure and composition of the Board of Directors, shareholder approval, quorum requirements for shareholders'



meetings and related continued listing criteria.<sup>4</sup>

Under the proposal, where it appears to the NYSE that a non-U.S. company's interim earnings reporting or corporate governance practices are consistent with the law or practices in the country in which it is domiciled, such practices need not necessarily be barriers to listing or continued listing.

To assist the NYSE in considering the question of the listing or continued listing of the securities of a non-U.S. company whose interim earnings reporting or corporate governance practices are not in compliance with Exchange requirements for domestic companies, the non-U.S. company would be required to furnish the Exchange with a written certification from independent counsel in the country of the non-U.S. company's domicile as to whether or not the non-complying practices are consistent with home country law or practice.

In applying the modified standard, the NYSE will not accept a home country law or practice which allows or requires reporting of earnings less frequently than semi-annually.

The modification to the NYSE's interim earnings reporting requirement will not alter a non-U.S. company's obligation to publicly disclose any significant change in its earnings trends between semi-annual reports under the NYSE's "Timely Disclosure of Material News Developments" policy.

Finally, non-U.S. companies listing under the modified standard will, like presently listed companies, be required to provide an English language version of earnings and other reports.

(2) *Basis.* The proposed rule amendment is consistent with sections 6(b)(5) and 11A(a)(1)(C)(ii) of the Act. Those sections, among other things, require that Exchange rules be designed to promote just and equitable principles of trade, facilitate transactions in

securities, remove impediments to and perfect the mechanism of a free and open market and assure fair competition among exchange markets and between exchange markets and markets other than exchange markets.

While the proposed amendment will afford the Exchange greater flexibility in determining the eligibility for listing of non-U.S. companies, this is intended solely to overcome the reluctance of such companies to list, thereby fostering competition.

According to the NYSE, the proposed rule amendment is also consistent with the Commission's treatment of foreign issuers in that such issuers which register securities on Form 20-F or are exempt from registration pursuant to Rule 12g3-2 under the Act are permitted to provide less extensive disclosure and are not subject to the proxy and quarterly reporting provisions of the Act.<sup>5</sup>

#### *(B) Self-Regulatory Organization's Statement on Burden on Competition*

The proposed rules changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rules Changes Received from Members, Participants, or Others*

The NYSE has neither solicited nor received written comments concerning these proposed rules changes.

#### **III. Date of Effectiveness of the Proposed Rules Changes and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rules changes should be disapproved.

#### **IV. Solicitation of Comments**

As noted previously, the Commission recently has received proposed rule changes from the Amex and the NASD that relate to listing standards for foreign issuers. Amex, like the NYSE, believes that foreign companies are

reluctant to list on the Amex because of the difficulty in complying with listing standards that are either inconsistent with or contrary to their home country's laws and practices. Briefly, Amex proposes to amend Section 110 of the Amex Company Guide to permit the Exchange to "consider the laws, customs and practices of the applicant's country of domicile regarding such matters as (1) the election and composition of the Board of Directors; (2) the issuance of quarterly earnings statements; (3) shareholder approval requirements; and (4) quorum requirements for shareholder meetings."

The Amex proposal would require a foreign company to furnish American shareholders an English language version of their annual financial statements and all other materials regularly provided to other shareholders. It also would require that the company publish, at least semi-annually, an English language version of its interim financial statements.<sup>6</sup>

The NASD, unlike NYSE and Amex, currently does not have any corporate governance or shareholder reports requirements.<sup>7</sup> The NASD, however, has proposed to adopt certain corporate governance and annual and interim reporting requirements for all NASDAQ stocks designated as national market system ("NMS") securities pursuant to Rule 11Aa2-1 under the Act. Under this proposal, an NMS issuer would have to distribute to shareholders any annual and interim reports it is required to file with the Commission. The NASD proposal also would establish requirements relating to audit committees, independent directors, shareholder meetings, quorum, solicitation of proxies, and conflicts of interest.

Foreign issuers who are generally not subject to the Commission's quarterly reporting requirements, would not be required by the NASD proposal to send quarterly reports to shareholders. Furthermore, the reporting and corporate governance provisions of the proposal would not apply to a foreign issuer if these requirements would

<sup>4</sup> Specifically, under the terms of the NYSE proposal, non-U.S. companies applying for listing on the NYSE, and conforming to local practices in the country in which they are domiciled, would be eligible, for waiver or modification of the existing NYSE listing requirements, including requirements regarding (1) quarterly interim reporting of earnings; (2) dual class capitalizations with varying votes per share, and single classes of common stock with votes per share based upon tenure of holding the security; (3) quorum requirements that permit shareholder votes by less than a majority of securities entitled to vote on a proposal; (4) Audit Committees of, or independent director representation on, a company's Board of Directors; (5) classification of a company's Board of Directors or the terms of directors; and (6) shareholder approval for the issuance of securities.

<sup>5</sup> See letter from Richard A. Grasso, Executive Vice President, NYSE, to Michael Cavalier, Branch Chief, Division of Market Regulation, dated June 24, 1986.

<sup>6</sup> See Amendment No. 1 to File No. SR-NYSE-86-14.

<sup>6</sup> Amex noted in its filing with the Commission that the change in the quarterly reporting requirement would not alter the company's obligation to comply with the Amex's timely disclosure policies (Sections 401 and 405 of the Amex Company Guide).

<sup>7</sup> However, like the NYSE and the Amex, the NASD does require issuers of authorized NASDAQ securities to promptly disclose to the public through the press any material information which may affect the value of its securities or influence investors' decisions. See Subdivision B, Schedule D, Part II, Paragraph B(3)(b) of the By-laws of the National Association of Securities Dealers.



require the foreign issuer to do anything contrary to the law of any public authority exercising jurisdiction over the issuer or contrary to "generally accepted business practices in the issuer's country of domicile."<sup>8</sup>

The Amex and NYSE rule filings are constructed similarly. Both Exchanges have identified specific corporate governance provisions in their rules that may operate as an impediment to foreign listings that they propose to relax or waive. Each proposal then goes further to include a more general provision that would permit the Exchanges to waive or modify virtually any existing NYSE and Amex corporate governance listing standard that was inconsistent with the laws, customs or practices of the applicant company's country of domicile. As noted previously, the NASD filing also includes such a provision. The basis for granting such an exemption is not set out in any of the filings.

It appears clear that the self-regulatory organizations ("SROs") do not mean to grant waivers or exemptions only when it would be impossible for a company to comply with a specific corporate governance requirement and also comply with home country law. It is unclear, however, what additional circumstances the proposed rules are intended to encompass. If, for example, a waiver were available any time compliance with SRO rule requirements imposed any additional burdens on foreign companies beyond those imposed by law or custom by the country of domicile, the proposals would be tantamount to eliminating all listing standards in this area from foreign companies.

Thus, the Commission believes that the SRO proposals raise questions concerning appropriate listing

requirements for foreign issuers that choose voluntarily to list or have their securities quoted in U.S. markets. Among the issues raised are the potential competitive effects of such disparate listing standards or eligibility criteria on domestic companies and the impact of such a change on existing investor/shareholder protections embodied in current and proposed corporate governance standards.<sup>9</sup> The Commission, therefore, is seeking public comment on specific issues raised by these proposals. In this regard, commentators may wish to focus on the following questions:

(1) Will there be a material reduction in investor/shareholder protections if foreign companies' securities are permitted to be listed or traded on the NYSE, Amex or NASDAQ/NMS without being required to conform to the financial reporting and corporate governance standards currently required or proposed by the SROs?<sup>10</sup> Will

<sup>8</sup> NYSE corporate governance listing standards are included in Section 3 ("Corporate Responsibility") of the NYSE Listed Company Manual. Such standards include requirements relating to: Audit Committees, § 303.00; Concentration of Voting Power, § 305.00; Defensive Tactics, § 308.00; Quorum, § 310.00; Shareholder Approval Policy, § 312.00; and Voting Rights, § 313.00. The Commission notes that the NYSE's proposed amendment states that related policies and requirements set forth in other sections of the Company Manual, as they may relate to non-U.S. companies, are to be considered in light of the provisions of proposed section 103.

Amex governance standards for listed companies are set out in the Amex Company Guide, Part 1 ("Original Listing Requirements") and Part 7 ("Shareholders' Meetings, Approval and Voting of Proxies").

The qualitative requirements the NASD would exempt foreign issuers from are contained in its pending proposal, note 2, *supra*.

Both NYSE and Amex have different quantitative listing requirements (e.g., number of shareholders, number of publicly held shares, market value of publicly held shares, tangible net worth, pre-tax income) for non-Canadian foreign companies than for domestic companies. See Amex Company Guide, section 110; NYSE Listed Company Manual, section 103. These standards focus on worldwide distribution of shares rather than distribution within the United States. Both NYSE and Amex, however, permit non-Canadian foreign companies to qualify for listing under either the quantitative standards for domestic companies or those established for foreign companies. See Amex Company Guide, sections 101, 110; NYSE Listed Company Manual, sections 102, 103.

The NASD's quantitative standards are generally the same for domestic and foreign issues (including American Depositary Receipts ("ADRs")), except that foreign issues and ADRs exempt from registration under 12(g) of the Act by Rule 12g-2(b) under the Act or registered under Section 15(d) of the Act have different standards. In this connection, the Commission notes that the Rule 12g-2 exemption is no longer available for either Canadian issuers or for other issuers not quoted on NASDAQ as of October 1, 1983.

<sup>10</sup> In this regard, it should be noted that the NYSE, Amex and NASD proposals will not alter the obligation of a non-U.S. company participating in

investor confusion result if foreign listed companies are subject to different standards than domestic companies, and if the requirements vary from one foreign company to another? Is there an efficient way to apprise investors of the standards to which particular companies are subject?

(2) As noted above, both the NYSE and Amex proposals in their current form, would allow the Exchanges to modify or eliminate existing corporate governance listing requirements under certain circumstances. Although both the Amex and the NYSE proposals provide examples in their proposed rule of the types of listing standards which could be subject to waiver or modifications, neither Exchange specifies all standards that could be modified. Should the NYSE and Amex enumerate or limit the specific listing standards that would be subject to waiver or modification? Are there specific reporting or other listing standards that should be non-waivable? Should the Exchanges specify or limit the types of home country customs or practices that could be used to support the waiver or modification of exchange listing standards?

(3) Is there a potentially significant detrimental competitive impact on domestic companies by allowing foreign companies to list on the NYSE and Amex without requiring them to comply with the same financial reporting and corporate governance standards that are currently required of domestic companies listed on those exchanges?

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the NYSE, Amex

U.S. securities markets to comply with the requirements of either the Securities Act of 1933 or the Act and the rules and regulations promulgated thereunder.

<sup>8</sup> File No. SR-NASD-85-20 at 2.

The Commission has received a letter, from John D. Dingell, Chairman of the Committee on Energy and Commerce, U.S. House of Representatives, to John S.R. Shad, Chairman, Securities and Exchange Commission, dated May 1, 1986, commenting on the Amex and NASD proposals concerning foreign issuer listing standards. Chairman Dingell expressed general approval for the Amex's proposed disclosure standards which would still require foreign issuers to publish, at least semi-annually, an English language version of an interim financial statement. He also expressed concern, however, over the NASD's proposed corporate governance standards (File No. SR-NASD-85-20) which would exempt foreign issuers from complying with any listing requirement which was contrary to the laws, rules or regulations of any public authority exercising jurisdiction over the issuer or contrary to generally accepted business practice in the issuer's country of domicile, and which would impose no minimum disclosure requirement on foreign issuers such as a semi-annual English language earnings report.



or the NASD. All submissions should refer to the file numbers in the caption above and should be submitted September 2, 1986.

Dated: July 25, 1986.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 86-17386 Filed 7-31-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-23473; File No. SR-PSE-86-12]

**Self-Regulatory Organizations; Order Granting Accelerated Effectiveness of Proposed Rule Change by Pacific Stock Exchange, Inc.**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on July 7, 1986, the Pacific Stock Exchange Incorporated ("PSE" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

This filing will have the effect of changing the procedure used for the election of stop and stop-limit orders (i.e. when the orders become market orders or limit orders, respectively) by use of a quotation.

Under the terms of the proposed rule, a stop order to buy will become a market order when the *bid* price in the options series is quoted at or above the stop price. Conversely, a stop order to sell will become a market order when the *offer* price in the options series is granted at or below the stop price.

A stop-limit order to buy will become a limit order executable at the limit price or a better price (if obtainable) when the *bid* price in the options series is quoted at or above the stop price. A stop-limit order to sell will become a limit order executable at the limit price or at a better price (if obtainable) when the *offer* price in the options series is quoted at or below the stop price.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.

**(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change**

As of now, the stop and stop-limit orders can only be elected when a transaction in the options series occurs at the stop price. As a result, stop and stop-limit orders used in connection with inactive options series often remain unexecuted on the Order Book because no transaction takes place at the stop price.

In addition, the PSE notes that the proposed rule change will permit the same elections that are now provided for in the Philadelphia Stock Exchange Rule 1066(g), approved by the Commission on December 4, 1985, and in the recently approved rules of the American Stock Exchange (File No. SR-AMEX-84-41) and the New York Stock Exchange (File No. SR-NYSE-85-32). (See SEC Release Nos. 22240 and 22495, respectively.)

The PSE believes that this filing is consistent with section 6(b)(5) of the Securities Exchange Act of 1934 in that it will facilitate transactions in securities and remove impediments to the mechanisms of a free and open market.

**(B) Self-Regulatory Organization's Statement on Burden on Competition**

The Exchange does not believe that the proposed rule change imposes a burden on competition.

**(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others**

Written comments on the proposed rule change were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange requests that the proposed rule change be given accelerated effectiveness pursuant to

section 19(b)(2) of the Act because the rule change is substantively identical to proposals previously filed by the American, Philadelphia and New York Stock Exchanges and approved by the Commission.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, the requirements of section 6 and the rules and regulations thereunder.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication thereof because the rule change is substantially similar to proposals previously filed by the American,<sup>1</sup> New York,<sup>2</sup> and Philadelphia<sup>3</sup> Stock Exchanges and approved by the Commission.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned, self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 22, 1986.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change referenced above be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

<sup>1</sup> See Securities Exchange Act Release No. 22240 (July 15, 1985), 50 FR 29776 (July 22, 1985).

<sup>2</sup> See Securities Exchange Act Release No. 22495 (October 2, 1985), 50 FR 41062 (October 8, 1985).

<sup>3</sup> See Securities Exchange Act Release No. 22630 (November 11, 1985), 50 FR 48517 (November 25, 1985).



Dated: July 28, 1986.

Jonathan G. Katz,

Secretary.

[FR Doc. 86-17387 Filed 7-31-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-23470; File No. SR-PSE-86-14]

# **Self-Regulatory Organizations; Proposed Rule Change by The Pacific Stock Exchange, Inc.**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on July 17, 1986, The Pacific Stock Exchange Incorporated ("PSE" or the "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

## **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

This filing will have the effect of first, consolidating all references to the procedure of appealing a sanction issued by a floor citation into one rule, Rule XX, section 11.

While in the process of consolidating these rules, the Exchange is, in addition, clarifying and adding to the procedure for appealing as follows:

The relevant section of Rule XX, will now be specifically applied to the appeal of floor citations rather than "Exchange action other than disciplinary actions and arbitrations;"

The Exchange has added the ability to request witnesses at a hearing on these matters, at the discretion of the panel, to further protect the members' rights and to ensure a fair hearing;

The Exchange has deleted the provision that requires a copy of the application for hearing and review to be sent to the Board of Governors, due to the fact that the application is automatically accepted and the Board will review the matter at a later time;

The Exchange has amended the provision that allows the Board to reopen a decision of the appeal panel to either thirty days from the date of the decision, as it now reads, or upon the first presentation made to the Board, which could be beyond the original thirty day period.

The Exchange has expanded the composition of the hearing panel to

include either members of the existing committee that has jurisdiction over the matter, or other members which the committee has approved to act as hearing panelists.

In the second part of the filing, the Exchange is amending Rule XX, section 5, which sets out the procedures to be followed in the course of Exchange disciplinary actions. Specifically, section 5 has a default provision which allows for a summary determination to be made by a Hearing Committee when a Member fails to answer any formal complaint issued by an Exchange Committee. The amendment to this section will be to delete that part of the section that allows a Member ten days after the summary determination to reopen the matter and ask for a hearing.

## **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.

### *(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change*

A. Since the inception of the Rules governing options trading, there has been an ongoing need to revise certain aspects of the Rules to conform them to the natural evolution of regulation in this relatively new trading environment. This proposed rule change is an example of such a need.

Originally, section 84 was drafted to allow members to request a review or hearing for what was termed "Exchange action other than disciplinary actions and arbitrations." This term was intended to cover those types of actions that are now dealt with by the use of Floor Citations.

Citations are issued on the floor of the Exchange by Floor Officials whose duty it is to see that the members do not violate any of the specific rules dealt with by citations. However, because section 84 was drafted prior to the establishment of the citation system, it is not stated that the Section applies to Floor Citations.

Accordingly, the first part of the rule change is designed to update section 84 to ensure that it is applicable to the

current procedures of the Exchange. The Exchange has also added the ability to request witnesses at a hearing on these matters, at the discretion of the panel, to further protect the members' rights and to ensure a fair hearing.

Two additional changes appear in paragraph (c) of the current section 84, "Procedure Following Applications for Hearing and Review." The first change is to paragraph (c)(1) which deletes the provision that requires a copy of the Application for Hearing and Review to be sent to the Board of Governors.

When an application for a hearing or review is made, the appropriate committee grants the review automatically. Therefore, sending the Application to the Board has no effect since the review will take place regardless of whether the Board receives the Application or not. Once a member submits an application for hearing or review, a 3-member Hearing Panel is selected to hear or review the matter. The Panel's decision is then submitted to the full committee for their review, and is reported in the subsequent minutes. Because the Board receives the minutes of the Committee and then has the opportunity to review the Decision, the Exchange considers the initial referral of all applications to the Board to be an unnecessary duplication.

The second change to paragraph (c) of section 84 is in (c)(1) which sets forth a deadline for review of a decision by the Board, on its own motion, within thirty days after issuance of the decision. The Exchange is concerned with the fact that there are times when, due to various factors, the Board may not see the decision within the thirty days after issuance. If that occurred, the Board would be precluded from reopening a decision if they felt it was incorrect. The Exchange has therefore added the provision to allow the Board to reopen the matter either within thirty days from the date of the decision, or upon presentation to the Board, whichever is later. This will ensure that the decision can be reopened by the Board at the time it is presented to them.

In (c)(1) of section 84, the Committee will now be able to appoint a hearing panel composed of other approved members besides the current members of the Committee. This will allow hearings to be held without the delay caused by the inability of Committee members to find the time to serve as hearing panelists.

Finally, the entirety of section 84 will be transferred to Rule XX Section 11, "Disciplinary Proceedings" in order to consolidate all disciplinary matters.



B. Rule XX of the Rules of the Board of Governors of the Pacific Stock Exchange Incorporated ("Exchange") sets out the procedures to be followed in the course of Exchange disciplinary actions. Section 5 of the Rule allows for a summary determination to be made by a Hearing Committee when a Member fails to answer any formal complaint issued by an Exchange Committee. This default provision only comes into use when the member has failed to exercise his right to respond after several requests from the Exchange staff. However, once a determination as to penalty is made, the member must be notified of the penalty and is given ten days to ask for a Hearing.

While the Exchange is mindful of protecting the due process rights of the member, it is also aware that section 5 is overboard in that respect. As a matter of practice and courtesy, Exchange staff notifies members of matters which could subject them to disciplinary action even before they are initially brought to an Exchange Committee, and affords them the opportunity to state their case. A Committee, composed of their peers, then carefully deliberates on the merits of the case and considers the members' response if they choose to submit one.

If a Committee issues a Complaint, a member has at least fifteen days to file an Answer. Staff is lenient with respect to the granting of extensions, and also does not require a high level of formality with respect to the Answer. If no Answer is received, the member is again contacted and asked to supply the Answer. If, at that time, no Answer is yet given, the same Committee then imposes a penalty based upon finding the member in default.

The Exchange is of the belief that sufficient safeguards are in place to protect the due process rights of the members even without the provision in section 5 which allows a defaulting member to set aside the determination of the Committee. For example, once a default penalty has been imposed by the Committee, a member may still petition the Board of Governors for a rehearing, irrespective of the default provision found in section 5. In addition, any member who is disciplined by the Exchange may petition the Securities and Exchange Commission for yet another review. The Exchange feels that such a rule change will have the practical effect of saving a substantial amount of staff time that could be allocated to other needs.

This proposed rule change is consistent with section 6(b)-(5) of the Securities Exchange Act of 1934 in that it is designed to foster cooperation and coordination with the members of the

Pacific Stock Exchange and the Exchange's regulatory staff; and in accordance with section 6(b)(7) in providing a fair procedure for the disciplining of members and those associated with members.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change imposes a burden on competition.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments on the proposed rule change were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of the publication of this notice in the *Federal Register* or within such longer period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so findings; or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 5th Street NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned, self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 22, 1986.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 86-17385 Filed 7-31-86; 8:45 am]  
BILLING CODE 8010-01-M

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**Radio Technical Commission For Aeronautics (RTCA); Special Committee 156—Potential Interference To Aircraft Electronic Equipment From Devices Carried Aboard; Meeting**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I) notice is hereby given of a meeting of RTCA Special Committee 156 on Potential Interference to Aircraft Electronic Equipment from Devices Carried Aboard to be held on August 26-27, 1986, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC, commencing at 9:30 a.m.

The Agenda for this meeting is as follows: (1) Chairman's remarks; (2) Approval of Tenth Meeting's Minutes; (3) Review of Task Assignments; (4) Committee final report. Integrate assigned sections into a First Draft; (5) Other business; (6) Task Assignments; (7) Date and place of next meeting.

Attendance is open to the interested public but limited to space available. With approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC. 20005; (202) 682-0266. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, D.C., on July 24, 1986.

Wendie F. Chapman,  
Designated Officer.

[FR Doc. 86-17301 Filed 7-31-86; 8:45 am]  
BILLING CODE 4910-13-M

**Proposed Advisory Circular; Performance Information for Operation With Water, Slush, Snow, or Ice on the Runway**

**AGENCY:** Federal Aviation Administration.



**ACTION:** Notice of proposed revision to advisory circular 91-6A and request for comments.

**SUMMARY:** This notice announces the availability of and requests comments on a proposed advisory circular (AC) which provides information, guidelines, and recommendations concerning the takeoff and landing performance of turbojet aircraft on wet runways or runways contaminated by standing water, slush, snow, or ice.

**DATE:** Comments must be received on or before September 30, 1986.

**ADDRESS:** Send all comments on the proposed AC to: Federal Aviation Administration, Flight Technical Programs Branch, AFO-210, 800 Independence Avenue SW., Washington, DC 20591. Comments may be inspected at the above address between 7:30 a.m. and 4:00 p.m. weekdays, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Richard Gough, AFS-210, at the above address, telephone (202) 426-8452.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

A copy of the proposed AC may be obtained by contacting the person named above under "FOR FURTHER INFORMATION CONTACT." Interested persons are invited to comment on the proposed AC by submitting such written data, views, or arguments as they may desire. Commenters must identify AC 91-6B and submit comments in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Flight Technical Programs Branch before issuing the final AC.

**Discussion**

Advisory Circular 91-6A has long been available as guidance for adjusting airplane takeoff performance to account

for contaminants on the runway and their detrimental effect on airplane acceleration performance. The purpose of proposed AC 91-6B is to replace AC 91-6A with guidance that is greater in scope in that both the loss in acceleration and reduced braking are considered. Advisory Circular 91-6B also reflects the experience gained from many years of aircraft operation on contaminated runways. Whereas AC 91-6A reflects a need only for adjustments to takeoff data, proposed AC 91-6B includes both takeoff and landing. AC 91-6B also recommends consideration of an engine failure during the takeoff and the use of reverse thrust during a rejected takeoff or landing if the airplane is so equipped. In addition, proposed AC 91-6B offers expanded guidelines regarding the definitions of runways with various contaminants, and the braking coefficients that are considered appropriate to each.

Issued in Washington, DC on June 20, 1986.

William T. Brennan,

*Acting Director of Flight Standards.*

[FR Doc. 86-17302 Filed 7-31-86; 8:45 am]

BILLING CODE 4910-13-M

## DEPARTMENT OF THE TREASURY

### Office of the Secretary

[Supplement to Department Circular—Public Debt Series No. 24-86]; Interest rate on Treasury Notes of Series AC-1988

Washington, July 24, 1986.

The Secretary announced on July 23, 1986, that the interest rate on the notes designated Series AC-1988, described in Department Circular—Public Debt Series No. 24-86 dated July 17, 1986, will be 6½ percent. Interest on the notes will

be payable at the rate of 6½ percent per annum.

Gerald Murphy,

*Fiscal Assistant Secretary.*

[FR Doc. 86-17297 Filed 7-31-86; 8:45 am]

BILLING CODE 4810-40-M

## UNITED STATES INFORMATION AGENCY

### Culturally Significant Objects Imported for Exhibition; Addition

On July 9, 1985, notice was published at page 28058 of the Federal Register (50 FR 28058) by the United States Information Agency pursuant to Pub. L. 89-259 relating to the exhibit "Treasures of the Holy Land: Ancient Art from the Israel Museum." Since that notice was published, USIA was informed that an additional object is to be included in the exhibit. It is a mosaic pavement from the site of Beth Shean.

I hereby determine that this object is of cultural significance, and that display of the exhibit at the Metropolitan Museum of Art, New York, New York, beginning on or about September 25, 1986, to on or about January 5, 1987; the Los Angeles County Museum of Art, Los Angeles, California, beginning on or about April 9, 1987, to on or about July 5, 1987; and the Houston Museum of Fine Arts, Houston, Texas, beginning on or about October 31, 1987, to on or about January 17, 1988, to be in the national interest. A copy of the list of objects covered by this notice may be obtained by contacting Mr. John Lindburg of the Office of the General Counsel of U.S.I.A. The telephone number is 202-485-7976, and the address is Room 700, 301 4th Street SW., Washington, DC 20547.

Dated: July 25, 1986.

Thomas E. Harvey,

*General Counsel and Congressional Liaison.*

[FR Doc. 86-17347 Filed 7-31-86; 8:45 am]

BILLING CODE 5230-01-M



# Sunshine Act Meetings

Federal Register

Vol. 51, No. 148

Friday, August 1, 1986

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

1

## FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Meeting

**SUMMARY:** Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of a forthcoming meeting of the Farm Credit Administration Board (Board).

**DATE AND TIME:** The meeting is scheduled to be held at the offices of the Farm Credit Administration in McLean, Virginia, on August 5, 1986, from 10:00 a.m. until such time the Board concludes its business.

## FOR FURTHER INFORMATION CONTACT:

Kenneth J. Auburger, Secretary to the Farm Credit Administration Board, 1501 Farm Credit Drive, McLean, Virginia 22102-5090 (703-883-4010).

**ADDRESS:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090.

**SUPPLEMENTARY INFORMATION:** Parts of this meeting of the Board will be open to the public (limited space available), and parts of the meeting will be closed to the public. The matters at the meeting are:

1. Approval of Minutes of July Meeting.
2. Amendment to Rules of transaction of Business of the Farm Credit Administration Board.
3. Regulations:

## Final

Part 611—Mergers, Consolidations, Territory Adjustments, Conservatorships, Receiverships

## Proposed

- Parts 614 and 615—Elimination of Prior Approvals Relating to Capital Adequacy Related Regulations
4. Action on Loan Documentation Standards.
  - \*5. Consideration of Personnel Related Matters.

\*\*6. Examination, Supervision, and Enforcement Matters.

\*Closed Session—Exempt pursuant to 5 U.S.C. 552b(c)(2).

\*\*Closed Session—Exempt pursuant to 5 U.S.C. 552b(c) (8) and (9).

Dated: July 29, 1986.

**Kenneth J. Auburger,**

*Acting Chairman, Farm Credit Administration Board.*

[FR Doc. 86-17456 Filed 7-30-86; 1:02 pm]

**BILLING CODE 6705-01-M**







# FRIDAY August 1, 1986 Part II Department of Agriculture Farmers Home Administration 7 CFR Parts 1930, 1944, 1951, and 1965 Management and Supervision of Multiple Family Housing Borrowers and Grant Recipients; Final Rule

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Friday  
August 1, 1986

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## Part II

### Department of Agriculture

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#### Farmers Home Administration

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7 CFR Parts 1930, 1944, 1951, and 1965  
Management and Supervision of Multiple  
Family Housing Borrowers and Grant  
Recipients; Final Rule



**DEPARTMENT OF AGRICULTURE****Farmers Home Administration****7 CFR Parts 1930, 1944, 1951 and 1965****Management and Supervision of Multiple Family Housing Borrowers and Grant Recipients**

**AGENCY:** Farmers Home Administration, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Farmers Home Administration (FmHA) amends its regulations governing the management and supervision of Farmers Home Administration (FmHA) Multiple Family Housing Loan and Grant Recipients. This action is taken to incorporate changes required by the Housing and Urban-Rural Recovery Act (HURRA) of 1983, and to make administrative changes and clarifications. The intended effect of this action is to implement policy changes based on consideration of public comments received in response to proposed rule of July 16, 1985, (50 FR 28782).

**EFFECTIVE DATE:** October 1, 1986.

**FOR FURTHER INFORMATION CONTACT:** James D. Tucker, Branch Chief, Multiple Family Housing Servicing and Property Management (MHSPM) Division, Room 5321-S, Farmers Home Administration, USDA, 14th and Independence Avenue, SW., Washington, DC 20250. Telephone: (202) 382-1618.

**SUPPLEMENTARY INFORMATION:****Classification**

This action has been reviewed under USDA procedures established in Departmental Regulation 1512-1 which implements Executive Order 12291, and has been determined "nonmajor." This action will not result in an annual effect on the economy of \$100 million or more. This action will not result in a major increase in the cost or price for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This action will not cause any significant adverse effects on competition, employment, investment, productivity, or innovation. This action will not cause any significant adverse effects on the ability of enterprises based in the United States to compete with foreign-based enterprises in domestic or export markets.

**Environmental Impact Statement**

This document has been reviewed according to 7 CFR Part 1940, Subpart G, "Environmental Program." It is the

determination of FmHA that the proposed action does not constitute a major Federal action significantly affecting the quality of the human environment. According to the National Environmental Policy Act of 1969, Pub. L. 91-190, an Environmental Impact Statement is not required.

**Intergovernmental Review**

This program/activity is listed in the Catalog of Federal Domestic Assistance under numbers 10.405, 10.411, 10.415 and 10.427 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

**Regulatory Flexibility Act**

The Administrator, Farmers Home Administration, USDA, has determined that this action will not have a significant economic impact on a substantial number of small entities because it contains normal business recordkeeping requirements and minimal essential reporting requirements.

**General Information****Background and Statutory Authority**

On November 18, 1983, the Ninety-Eighth Congress passed legislation known as the Housing and Urban-Rural Recovery Act (HURRA) of 1983. The legislation was enacted November 30, 1983, upon signature by the President. A major thrust of HURRA is to require alignment of the FmHA definitions of low-income families or persons and very low-income families or persons with those established by the Department of Housing and Urban Development (HUD) in implementing the provisions of the United States Housing Act of 1937. Closely related is the requirement that FmHA's definitions of income and adjusted income be consistent with those established by Congress under sections 3(b)(4) and 3(b)(5) respectively of the United States Housing Act of 1937, which are described in this rulemaking. Another requirement of HURRA is the establishment of rules prohibiting denial of common household pets in federally assisted housing for the elderly as required by section 227 of HURRA.

Other changes correct and clarify the proposed rule in response to questions raised by the public and FmHA staff.

**Responses to Public Comments**

Numerous public comments were received on the proposed rule during the comment period. Comments were received on a variety of issues. A summary of the most significant issues surfaced follows. The following

discussion of comments relates to Exhibit B to Subpart C of Part 1930 unless otherwise indicated.

**HUD Related Changes****Definitions**

A number of comments indicated that contrary to the provisions of law, FmHA income definitions differed from those published by the Department of Housing and Urban Development (HUD). The FmHA does not interpret the law as requiring adoption of the exact wording used by HUD. The FmHA considered the proposed definitions to be compatible with those used by HUD and definitions in 7 CFR Part 1944, Subpart A (50 FR 39959), (50 FR 48372) and (51 FR 6393), for making FmHA Single Family Housing loans. The latter provisions also implement requirements of HURRA to be compatible with HUD income definitions. This rulemaking action defines income to achieve an even greater degree of compatibility with HUD definitions and FmHA's Single Family Housing loan program definitions.

Commentors indicated the income exclusions were not compatible with those used by HUD because the Agency did not specifically list HUD's exclusion of any income excluded by Federal statute. The Agency listed those programs it considered applicable for exclusion; however, with the vast amount of legislation the Agency recognizes an accurate listing is difficult to maintain. The Agency agrees there is a need to incorporate wording excluding any income specifically exempted by a Federal statute along with a listing of programs the Agency has identified as meeting the criteria. The Agency also updates the published listing to include exclusion of income derived from benefits received by the Job Training Partnership Act, benefits from certain funds held in trust by Indian tribes, etc., and modifies its listing excluding benefits of the Food Stamp Act of 1964 to correctly reference the amended Food Stamp Act of 1977. The Agency agrees to move to achieve needed compatibility with HUD rules governing sources which can be excluded from annual income by adding wording similar to that utilized in the FmHA's Single Family Housing program. The latter wording is considered to be more compatible with HUD rules and received public comment review.

Public comments were received indicating income deductions for medical expenses not covered by insurance should be based on past expenses rather than projected



expenses. The Agency chose to retain the use of projected expenses. The Agency anticipates adequate capability exists to reasonably expect that medical expenses can be projected. Projections are used for all future income and deductions. The approach to permit income deductions for projected medical expenses not covered by insurance is also used by HUD. The Agency is required by law to adopt income definitions which are compatible with those used by HUD.

Commentors indicated a more definitive statement of what constitutes substantial income from domestic farm labor should be incorporated in the definition of domestic farm laborer. Commentors cited a motion for entry of consent judgment and a consent judgment entered before the United States District Court for the Southern District of Florida in Case Number 82-0451. The Agency offered to propose clarifying language as indicated in its motion for entry of consent judgment; however, the final consent order did not require the Agency to immediately promulgate such regulations. The Agency recently addressed the need for clarifying language. Such clarifications were recently adopted by a separate final rulemaking action published in the Federal Register on June 24, 1986, (51 FR 22924) at § 1944.153 of Subpart D of Part 1944. This regulation incorporates those definitions by reference.

The Agency noted commentors' request to include persons who are on indefinite parole in the definition of eligible domestic farm laborers. The Agency will pursue any needed implementation of clarifying language related to this issue through separate rulemaking action in 7 CFR Part 1944 Subpart D.

Concern surfaced over the Agency's definition of elderly to include persons with specified handicaps and disabilities. Concern surfaced over whether marketability may be eroded by permitting the disabled and their families to occupy elderly projects which restrict children. Concern also surfaced that any definition permitting persons with disabilities to live in an elderly project incorporate safeguards in the definition to allow owners to prohibit entry of such persons in any project not already modified to accommodate such persons. The Agency believes admitting handicapped or disabled persons in elderly projects is unlikely to cause serious marketability problems. The Agency expects retrofit applicability in existing projects to afford handicapped accessibility if a handicapped person applies for

occupancy. The Agency does not expect existing housing to be subject to standards which would exceed new construction standards. New construction standards normally require five percent of the units in the project site or one unit, whichever is greater, to be accessible to or adaptable for physically handicapped persons. The Agency recognizes permitting disabled persons to live in elderly projects may potentially raise project expenses. The Agency does not, however, view such possibilities as being so serious as to warrant prohibiting entry of handicapped and disabled persons. The Agency may grant recovery of such expenses via a request to modify the project's budget. Thus, owners have a means to seek recovery of any expenses needed to accommodate handicapped and disabled persons. Furthermore, the Agency notes the law prohibits handicapped or disabled persons from being barred from entry in an elderly project.

Commentors indicated the proposed rulemaking treatment of selected net family asset exclusions from income is flawed and not sufficiently compatible with HUD rules. The Agency agrees with commentors indicating automobiles and personal property should be excluded only if found to be essential living expenses. The Agency also agrees that the definition otherwise lacks sufficient compatibility with HUD rules in that coverage excluding property in trust and disposal of selected assets for less than fair market value is not provided while HUD rules address these issues. The Agency adopts needed changes to paragraph II W of Exhibit B of Subpart C of Part 1930 of this chapter to achieve needed compatibility with HUD rules. One commentor indicated certain assets such as income from notes receivable from the sale of a farm should be exempted from being considered as income for those rural areas served by the FmHA. The Agency believes the enabling legislation contemplates providing subsidized housing by giving priority to those exhibiting the greatest need. The Agency believes the regulations as modified establish proper and prudent rules while protecting rural residents from unreasonable barriers. The Agency does not find sufficient cause to warrant adoption of the latter suggestion.

A number of comments were concerned that the methodology and/or listing of the annual income limits for the published very low, low and moderate income definitions were not printed as a part of the proposed rulemaking action. The Agency believes

that the proposed rulemaking action adequately addressed this issue by providing that the limits are available in FmHA Offices. Furthermore, the Agency notes Congressional intent to adopt income definitions comparable to those used by HUD. The Agency believes the public was afforded adequate access to the information related to the income definitions published.

Concern was surfaced over a potential technical flaw in the definition of a tenant. The concern indicated that the definition as written may present an unintended barrier frustrating owners seeking to gain possession of an apartment not occupied by a tenant. The concern indicated the wording conveys that FmHA consider a person a tenant until personal property is removed voluntarily or by legal court proceedings. The Agency agrees a modification is needed to remove a potentially serious flaw in its proposed rulemaking action. The Agency recognizes tenants may not voluntarily remove property and that legal court proceedings may entail considerable time; therefore, the Agency agrees it must also permit owners to continue their right to gain possession through lawful means including eviction in accordance with local legal codes.

#### Increase in Tenant Contribution

The public comments were both favorable and unfavorable for the proposed change to permit an increase in the required tenant housing contribution from 25 percent to 30 percent of adjusted income without resorting to the degree of complexity used by HUD in implementing its rules to raise the level of the required tenant housing contribution. Alternative methods were suggested to phase in any increase in a tenant's required housing contribution. In addition, concerns were surfaced that the provisions of 42 U.S.C. 1940a will not be properly applied because the Agency did not recognize that the 10 percent cap on any rental increase caused by increasing the required level of tenant housing contribution, was intended to apply regardless of whether such increase was brought about by a change in the definition of income and/or an increase in the required level of housing contribution. Concern was also surfaced that the provisions of 42 U.S.C. 1940a will not be properly applied because the Agency did not recognize that those requirements also apply to any rental increases the Agency may authorize. An example of such is FmHA authorizing rents for low or very low income persons to be raised to 125 percent of



market rent for tenants deemed ineligible due to reasons such as violating lease restrictions governing extended absences. Concern was also surfaced over the need to discuss how the required rental housing contributions for Plan I projects are derived in the provisions of Exhibit B of Part 1930 Subpart C. Additionally, concern was raised about whether the provisions governing the required housing contribution should contain technical differences for those residing in residences before and after any final rulemaking issuance.

Rental increases above 10% must be shown to be unrelated to the Housing and Urban-Rural Recovery Act (HURRA) or other law or regulation. The Agency will use its revised tenant certification form to ensure these requirements are met. The Agency finds the law permits increases above 10% for changes due to income changes or future rental changes not attributable to HURRA. The Agency also concludes that the law permits the Agency to authorize some or all of low or very low income rents to be raised up to 125 percent of market rent for tenants deemed ineligible due to reasons such as violating any lease restrictions governing extended absences. The Agency contends any 10% cap on tenant housing contributions is applicable to eligible tenants and further contends such provisions of law did not apply to authorized penalty provisions imposed for reasons such as failure to meet lease covenants.

The Agency considers the required tenant housing contribution levels to be adequately covered in Exhibit E to Part 1930, Subpart C. The Agency considers the provisions governing the required level of tenant housing contribution appropriate. The Agency notes a technical modification is needed to enable tenants to continue receiving Rental Assistance (RA) when the gross tenant housing contribution is shown to be above the specified thresholds (i.e., 30% of monthly adjusted income, etc.). This change is needed because due to the HURRA provisions, some tenants previously categorized as low income will be pushed into a moderate income category. The proposed rulemaking action considered such applicants ineligible for RA. Failure to make a technical change would require the project to absorb an income reduction until such time as an increase in rental rates were authorized. Additionally, this technical change is needed to promote more uniformity in program delivery and prevent potential vacancy problems. High housing costs attributable to

differences in climates will require many moderate income tenants to have housing costs above 30% of their adjusted income. This could cause such tenants to be unable to afford the rental rates. These conditions warrant making an exception to the RA eligibility standards to permit tenants receiving RA to continue getting RA. The exception criteria will provide a smoother transition period than would otherwise be expected to occur.

#### Other Changes

Public commentators offered a number of technical changes related to management agreements and management compensation including suggestions as to what should constitute acceptable fees. The Agency considers its proposed rulemaking wording to be adequate in this area.

A number of commentators were concerned with the proposed eligibility standards for continued occupancy. Commentators suggested a variety of alternatives including the retention of existing occupancy standards in lieu of adopting the proposed changes, and modification of various parts of the newly proposed standards.

The Agency carefully considered public comments in this area and concluded there was insufficient public support to warrant adoption of the flexible occupancy standards published in the prior rulemaking action. The Agency therefore chose to retain its existing occupancy standards with minor modifications primarily aimed at streamlining the processing of any requests for an exception to the existing occupancy standards.

Commentators suggested a variety of technical changes to rules governing project management compensation. Suggested changes included requiring fees to be set at a fixed amount per occupied unit unless an exception is given by the Agency, establishing a range of acceptable fees, describing what constitutes excessive fees, requiring any evaluation of reasonable management compensation to be based on non-FmHA projects providing similar services and providing better guidance on how management compensation is reported on a project's cash budget. The Agency believes the prior rulemaking issuance provided appropriate guidance on management compensation without making additional policy changes. The Agency contends that the nature of the suggested changes would prove to be administratively too cumbersome or impractical to adopt.

Concern was surfaced that requiring tenants to vacate projects, should their adjusted annual income exceed the

moderate income limit established, is not appropriate to apply to the Rural Rental Cooperative (RCH) program. The Agency agrees but believes no clarifying changes are needed. Since residents of RCH projects are not considered tenants the provisions cited do not apply.

Concern was surfaced that placement of an absence restriction in the occupancy standards and the lease is inappropriate, discriminates against lower income households and interferes with constitutional rights to travel. The Agency contends the absence restrictions do not violate constitutional rights to travel and that the standards are needed and are appropriate. The regulations afford an owner an objective and practical means to seek remedy against tenants suspected of not being entitled to federal benefits. Tenants are protected against arbitrary eviction by virtue of the notification requirements which must proceed any eviction proceedings. The tenants are also protected under State or local laws governing procedures for an airing of tenant eviction grievances. Similar concerns were surfaced over the policies governing tenant guests in paragraph VIII-F9 of Exhibit B to Subpart C of Part 1930. The Agency considers its tenant guest policies to be appropriate for reasons similar to those used in establishing restrictions on extended absences.

Concern was raised that the proposed occupancy standards permit too much flexibility with respect to establishing person per unit standards and/or standards governing the use of bedrooms by dependents of the tenant and/or co-tenant. The comments indicated a concern that the degree of flexibility permitted may lead to arbitrary and discriminatory admission policies. The Agency contends the proposed standards should provide sufficient protection against arbitrary and discriminatory admission policies. However, in view of the public responses in this area, the Agency concluded there was not sufficient public support for the flexible occupancy standards proposed. The Agency therefore chose to retain its existing occupancy standards with minor modifications primarily aimed at streamlining the processing of any request for an exception to the existing occupancy standards.

Concern was surfaced that a grandfather provision is needed for occupancy standards in effect under the terms of any existing lease. The Agency believes the provisions in paragraph VI B 2 of Exhibit B of Part 1930, Subpart C are adequate.



Comments were received that the proposed provisions, stipulating that rental agents should consider the use of credit reports, warrant being dropped or modified. Modification was suggested to require a comparison of past income and related living costs to the projected future income and related living costs when reviewing credit reports. Commentors are concerned that credit reports can be used in an arbitrary and abusive manner and may encourage discriminatory practices.

The Agency contends the use of credit reports in eligibility considerations is useful in evaluating eligibility for those seeking benefits from a lender of last resort such as the FmHA. The Agency contends management agents need not always be expected to consider the underlying causes for each denial action based on poor credit history. The FmHA believes it is sufficient to afford multi-housing tenant applicants a forum to challenge a denial action under the Agency's appeal procedures governing tenant applicants. Such forum provides appropriate protection against arbitrary and discriminatory practices by management agents/owners.

Commentors were concerned that it is not appropriate to require formerly eligible tenants to vacate at the end of their lease or 30 days whichever is longer if eligible tenants are on a waiting list and ready for occupancy. Commentors further indicated that such requirements may violate 7 U.S.C. 1941 (g) which provides that programs be carried out, consistent with program goals and objectives, so that involuntary displacement of families and businesses is avoided.

The Agency contends the provisions of paragraph VI B 5 of Exhibit B are appropriate and consistent with its enabling legislation. The multi-housing goals and objectives are to assist as many persons in the greatest need of decent, safe and sanitary housing, as is possible under the law and the Agency's implementing regulations. The Agency seeks to avoid involuntary displacements of those persons the Agency was charged to assist. The regulations are designed to achieve this objective.

The Agency notes that paragraph VI B 2 of Exhibit B provides adequate protection to ensure fair consideration of those existing tenants who occupied residences under earlier policies. The grandfather provisions of paragraph VI B 2 of Exhibit B permit continued same unit occupancy by tenants who met earlier eligibility requirements. Since servicing tenants of above moderate income limits is not consistent with the Agency's goals and objectives, they may

be properly required to vacate if other eligible tenants are available for occupancy. Since tenants who "under occupy" a unit are not consistent with Agency goals and objectives, because they restrict access by a greater number of eligible people, they may be properly required to vacate if other eligible tenants are available for occupancy. Since tenants who "over occupy" a unit are not consistent with Agency goals and objectives (because they exceed the occupancy standards designed to ensure decent, safe and sanitary housing) such tenants may be properly required to vacate if other eligible tenants are available for occupancy.

The Agency notes the District Director may permit continued occupancy by formerly eligible tenants for a reasonable period of time if vacating the unit in the time period prescribed creates an undue hardship on the family. Under such regulations families who may be under-utilizing a unit may be considered for retention as tenants when circumstances warrant such as when a known appropriately sized unit will become available for occupancy in the near future.

Commentors also were concerned that requiring the mandatory use of an inquiry list is a burdensome and unneeded requirement. The Agency considers an inquiry list to be a useful management tool. Upon reconsideration of this issue in light of the public comments received, the Agency agrees to make the use of such list optional.

Commentors indicated that it is wrong to stipulate that applicants who give written reasons why they cannot accept an offer to occupy an appropriately sized living unit, will forfeit their right to appeal the removal of their name from a waiting list. The Agency intended to convey that such appeal rights are forfeited when an applicant requests to be removed from a waiting list. The Agency agrees to amend paragraph VI E 1 of Exhibit B of Part 1930, Subpart C to preserve an applicant's right to appeal any removal from a waiting list unless the applicant has voluntarily lodged a written request to withdraw an application from consideration.

Concern surfaced over the failure of the regulation to give guidance if an employer refuses to verify income from employment. The Agency agrees and adds language to accept a notarized affidavit from the tenant identifying the tenant's gross annual income when an employer or income source refuses to verify income.

Concern was surfaced that interest and investment income should be included as examples of income which must be verified in writing by the

income source. The Agency contends adequate guidance is provided on this issue without the need to add clarifying language.

Concern surfaced that the Agency's proposal to let borrowers project income for labor housing tenants in instances where income cannot be easily verified invite abuse and thus should be dropped in favor of permitting a notarized affidavit from the tenant stating the gross annual income. The Agency believes the proposed rules on this issue are appropriate. The Agency anticipates that labor housing tenants may not be able to access a notary as readily as non-labor housing tenants.

Concern was surfaced that a limit be placed on the size of a waiting list to prevent the administrative burdens which can be encountered when waiting lists build up to large numbers. The Agency contends the provisions of paragraph VI C 7 of Exhibit B are adequate. These provisions permit borrowers to establish procedures to periodically purge inquiry and waiting lists.

Concern surfaced that additional safeguards should be imposed to protect against potential abuses in any application fee charges that owners may propose. Recommendations included prohibiting fees until such time as income verifications were necessary, prohibiting charges for staff costs or overhead, and requiring application fees to be included as project income. The Agency contends its regulations require application fees to be included as project income and that adoption of the recommended safeguards is not necessary.

The priority list procedures used in the maintenance of waiting lists and in the processing and selection of tenant applications elicited a number of public comments. Changes recommended included "grandfathering" applications on hand who are eligible for rental assistance (RA) into the highest processing priority, permitting owners to select low income applicants over very low income applicants for those existing projects already meeting their existing requirements to maintain a specified percentage of very low income applicants (i.e., 95 percent or 75 percent), permitting applications to be processed on a first-come-first-served basis, establishing an ineligible category at the lowest priority level, establishing coverage of the provisions of 42 U.S.C. 1485(o), and establishing a category preference for applicants residing in inadequate housing as the law intended as specified at 42 U.S.C 1490(1).



The Agency contends the proposed rulemaking regulations governing the maintenance of waiting lists, and the processing and selection of tenant applicants are in compliance with the provisions of 42 U.S.C. 1490(1) and 42 U.S.C. 1485 including the provisions of 42 U.S.C. 1485(o). Enabling selected low or moderate income applicants to have priority over very low income applicants is not consistent with Agency objectives of helping the greatest number of applicants who exhibit the greatest need for housing, attain access to decent, safe and sanitary housing. Requiring a priority listing for ineligible applicants or for those residing in inadequate housing is not considered necessary. The implementation of any such recommended priority requirements is considered burdensome, impractical and unnecessary under the law. The implementation of restrictions curtailing access by low or moderate applicants to units where RA is available even under conditions where no very-low income applicants are on a waiting list may threaten the financial viability of housing projects. The proposed rulemaking provisions set out at paragraph VI E 2 of Exhibit B are legally sufficient. The Agency also contends the implementation of the additional recommended priority categories would entail an increase in public reporting burdens and require a capacity to identify and confirm whether an applicant resided in inadequate housing. Such requirements would impose a considerable burden on private sector owners and such requirements are not required to carry out the spirit or letter of the law.

Concerns surfaced that requiring submission of an initial tenant certification on or before the day the tenant occupies the unit creates a burden on large operators. The Agency contends such a burden is minimal and that the requirement is reasonable.

Public concern indicated the Agency should consider requiring one annual tenant certification for each project instead of on the anniversary date of each tenant's previous certification. The Agency believes most project owners would object to adopting an annual recertification for the project because of the advantages inherent in spreading recertification workloads throughout the year.

Concern was raised over the clarity of the existing tenant income certification procedures. The Agency agrees that some clarifications were needed. The confusion surfacing over when the income recertification becomes effective should be eliminated by the

incorporation of an effective date on the tenant income certification form to be issued with this rulemaking action.

Concern was surfaced that the tenant income recertification process being used since implementation of the Automated Multi-Housing Accounting System (AMAS) presents the potential for serious financial burden on projects since payment of overage is required for any tenant without a current tenant certification on file. The Agency agrees that some relief from payment of overage is warranted when tenants served with eviction notices refuse to cooperate in providing current tenant recertifications. The Agency is permitting relief from payment of overage in such circumstances. The Agency contends payment of overage by the borrower is warranted in all circumstances other than as noted above. The borrower is expected to diligently obtain current income tenant certifications and can reasonably be expected to secure such certification under the rules proposed. Project managers failing to secure such certifications are expected to pay overages and seek appropriate reimbursement from the tenant. The Agency contends such requirements are reasonable.

Comments were received indicating that District Offices should not be required to notify the borrower in writing 90 days in advance of a tenant recertification and specify the due date. The Agency adopted this practice in an earlier regulatory issuance to insure owners would be aware of the penalties involved for failure to obtain current tenant certification for tenants. The Agency no longer believes it necessary to date such notice to be sent by District Directors and adopts the recommendation to drop this requirement.

Concerns were surfaced that the present FmHA policy of not allowing recapture of RA and overages for tenants moving out after the first of each month may result in a substantial loss for a project. The Agency is not convinced substantial losses may occur for a project due to its practice of paying RA based on a tenant's occupancy from the first of the month and basing overage collections on the first of the month occupancy. The Agency believes that the added costs to compute such payments and collections based on actual occupancy dates are likely to outweigh the costs required to accommodate a change. The Agency contends that typical project budgets will not incur substantial losses as a result of the Agency's policies governing

calculation of RA payment and/or overage collection. The Agency notes that over the long term the project is as likely to include benefits as it is losses by adopting a policy of paying RA and basing overage collections based on a first of the month tenant occupancy.

Concern was surfaced that the mortgage late fee penalties imposed on borrowers by the Agency are too severe. Permitting late fees of 6 percent of the monthly note installment was considered by some to be unwarranted. The Agency disagrees and notes it is not aware of any widespread concern in this area.

Concern surfaced that the Agency should permit interim certification when a tenant's income status or family-size changes while retaining the original certification expiration date. The Agency contends there is insufficient cause presented to warrant changing existing administrative requirements in this area.

Concerns surfaced that the technical provisions of the lease provisions be changed to convey that rents may change for failure to submit information necessary to certify income. The Agency adopts such changes.

Commentors requested regulations clarify when to record security deposits as project income. The Agency contends such added guidelines are not shown to be needed. The Agency requires security deposits to be reflected on project income budgets when such deposits become available as project income, an example of which occurs when security deposits are properly retained by the project because of the condition of a vacated unit.

Concern was surfaced that the proposed regulations prevent late fees from being paid from project income and that such requirements should not apply to nonprofit and public borrowers. The Agency contends such borrowers may have income sources to pay such fees. Should this not prove to be the case, the proposed regulations are sufficiently flexible to permit a waiver of late fee charges. The Agency contends additional changes are not shown to be needed.

Commentors expressed concern that any notice to terminate tenancy should properly inform tenants of an opportunity for review under Agency appeal procedures as required by 42 U.S.C. 1480(g). The Agency contends the proposed regulations are in compliance with the provisions of 42 U.S.C. 1480(g). The proposed regulations require any tenancy termination notice state the reasons for termination and refer to relevant portions of the lease. Such



notice must also give tenants prior notice of eviction in accordance with State or local law and advise tenants that the borrower may seek to enforce the termination only by bringing a judicial action at which time the tenant may present a defense. The Agency contends the provisions of 42 U.S.C. 1480(g) do not require tenancy termination appeal reviews to be done by FmHA. The law affords the flexibility of permitting such termination appeal reviews under State or local law. The Agency chooses to continue to permit termination appeal reviews be conducted under State or local law in lieu of providing such reviews under FmHA appeal procedures.

Concern was surfaced over the requirements for review lease provisions by the Office of the General Counsel (OGC) in selected cases. The recommendation was made to exempt review by OGC for any leases the borrower's attorney certifies is in compliance with State law even when used for multiple projects. The Agency contends a review by OGC is warranted. The Agency notes that the published provisions would permit use of an OGC approved sample lease for use within a State by borrowers owning multiple projects without the need to obtain separate OGC approval for use on each separate project. The Agency contends review by OGC is warranted to ensure that the lease complies with the requirements set out in FmHA Instructions as well as the State laws.

Concern was surfaced that the lease provisions were in need of technical changes including inserting provisions stipulating that required tenant contributions may be raised or lowered for failure to provide information necessary to certify tenant income. The Agency agrees that coverage of this issue needs to be contained in the lease provisions and makes appropriate wording changes to implement this recommendation.

Concern was surfaced that paragraph VIII E of Subpart B needed modification to permit a 30 day notice prior to implementing lease terms necessitated by the tenant certification process. The Agency notes the regulation permits such flexibility to meet any such provision which may be required by State law. The provisions permitting borrowers to serve an appropriate notice to the tenant must be done in compliance with any State laws governing such notices.

Public comments recommended that occupancy rules be approved and changed only by the State Director. The Agency contends that it is appropriate to permit exceptions to the occupancy

standards to be approved by the District Director.

Concern was surfaced that owners should be permitted to set occupancy standards without FmHA approval. Owners should also be permitted to change occupancy standards without the need to make proposed changes available to each tenant at least 30 days in advance of implementation and to advise tenants of a right to appeal such changes. The Agency contends its safeguards are prudent and should be retained.

Concern was surfaced that tenants should have the option to exclude all and/or certain pets in elderly projects. The Agency contends provisions permitting exclusion of certain pets may be made with the FmHA's Director's consent in accordance with approved pet rules. The Agency contends further changes in the pet occupancy standards are not warranted.

Commentors recommended regulations stipulate that project reserve funds be permitted to construct pet exercise areas, pay liability insurance, etc. The Agency contends such blanket approval is unwise.

Concerns surfaced that better guidance was needed as to what constitutes a reasonable pet security deposit. The Agency agrees that better guidance is warranted and incorporates a change to stipulate that pet security deposits must never exceed the basic rent established for the project.

Concern surfaced that the regulations governing security deposits are unwarranted and restrict efficient market functions. The Agency contends the regulations are warranted and do not impose substantial barriers to efficient market functions.

Concern was surfaced that the grace period for late payment fees be extended to the greater of 10 days or the period prescribed by State law. The Agency contends the 10 day grace period affords an adequate period of relief.

A number of comments were received on the Agency's proposed accounting system requirements. A majority of comments recommended the Agency prohibit the commingling of accounting and reporting records; however, support for commingling of such records was voiced by a number of commentors provided the requirements were carefully drafted to safeguard against abuse. The Agency believes it is wise to retain the proposed restrictions on the commingling of records for the immediately foreseeable future.

Concern was surfaced that the State Director should be given authority to grant an extension of the requirement to

submit audit results within 60 days of the end of the audit period. The Agency contends such a change is generally not warranted because of the need to receive timely reports to protect the integrity of the program. To comply with Departmental rulemaking action (See 7 CFR Part 3015) authorizing single audits for selected governmental units, the Agency incorporated provisions to accommodate single audits.

Concern was surfaced that the regulations prohibit authorizing a rent increase in any year in which an owner seeks an authorized withdrawal of the required initial 2 percent operating capital investment. The Agency amends its regulations to not preclude approval of a rental increase for normal expenses in the same year that an authorized withdrawal of the initial 2 percent operating capital investment is requested provided the withdrawal does not cause a deficit. The Agency notes any such rental increase sought must be justified and meet with FmHA approval (See Exhibit C of Part 1930 Subpart C).

Concern was surfaced that the proposed regulations governing fidelity bonds is improved but inadequate in some respects. Concern included confusion over whether a blanket bond was permitted to be taken covering both FmHA and non-FmHA security property. The Agency contends the regulations are sufficiently flexible to permit blanket coverage of both FmHA and non-FmHA security as long as FmHA security is separately identified and as long as the costs are established on a pro-rata basis. The Agency notes the latter provision may require that costs for coverage on classes of property be revealed so that a proper pro-rata basis can be calculated. The Agency also believes the proposed regulations should be amended to specifically recognize that commercial forms of insurance or bonding will be used whenever acceptable to the State Director. The Agency also concludes the proposed regulations warrant amendment to remove the need for the OGC to review commercial forms of insurance or bonding for acceptance as to legal sufficiency.

Concern surfaced over whether project owners should ever be required to maintain fidelity bond coverage. The Agency notes such coverage is required only for those owners/employees/management agents having access to project assets. The Agency contends blanket waiver of fidelity bond coverage for owners is not appropriate.

Commentors indicated that authorizing State Directors to contract out for selective non-decision making



servicing actions should be deleted to prevent abuses by inexperienced contractors and greater workload by the Agency. The Agency believes proper use of contractors can reduce Agency workload and provide better service to the public. The Agency believes it can provide the needed monitoring and oversight necessary to ensure the benefits derived from contracting exceed the costs.

Concern surfaced that the provision stipulating that payment of a return on investment may not produce a year-end deficit should be deleted. Concern was expressed that such provisions should be retroactively imposed on projects approved prior to November 30, 1983. Concern was expressed that the provisions are inappropriate especially since other provisions stipulate that rent increases for projects approved on or after November 30, 1983, must be based on actual expenses. The proposed provisions provide the prospect that an owner may never receive a return on investment.

The Agency contends that it is appropriate to impose the restriction on owner's investment return for all projects. The Agency further contends it is unwise to permit payment of a return of investment to owners which would produce a year-end deficit as such practices may threaten the financial viability of the project. The Agency contends retention of the proposed rulemaking provisions on this issue are prudent and appropriate. The older loan agreements/loan resolutions stipulate that operations will be conducted in compliance with Agency regulations.

#### Rent Changes in Exhibit C of Part 1930, Subpart C

Commentors expressed concern that the proposed procedures governing the processing of rent changes are cumbersome, likely to result in tenants receiving an invalid rent increase notice, likely to have a chilling effect on tenant comments, and may be legally deficient for not giving timely notice to tenants of the approved rent increase. The Agency contends the proposed procedures are legally sufficient and appropriate. The Agency is encouraging its borrowers to meet with the District Director to ensure the borrowers are aware of the documentation needed to review a requested rent increase. The borrower may choose to submit the needed documentation without attending a meeting, with the District Director's consent. The Agency further contends that the proposed procedures do not eliminate the need for owners to notify tenants 30 days in advance of the actual

rent increase or such other period as may be prescribed by law. The Agency notes that the provisions of Exhibit C-2 of Part 1930, Subpart C require such notice 30 days before a rent increase.

The Agency does not believe the proposed procedures will prove to have a chilling effect on tenant comments or prove to be cumbersome to administer.

Commentors indicated increased insurance costs beyond an owners control warrant the Agency's automatic approval of rent increases to recapture such costs, similar to the treatment afforded when utility costs and taxes increase. The Agency contends there is normally a competitive market for insurance. The Agency contends it should ensure owners explore the market for appropriate and affordable insurance coverage, before the Agency approves any rent increases to cover increasing insurance costs.

Since utilities usually are delivered via a "market" which is a monopoly, the Agency permits automatic approval of rent increases to recapture such increased costs. The Agency contends its policies on these issues are appropriate.

Concern was expressed that the provisions of paragraph III A 2 of Exhibit C inappropriately interpret the provisions of 42 U.S.C. 1485(g) by limiting rent change requests for projects built on or after November 30, 1983, to situations where need is demonstrated by actual costs incurred. The Agency contends it is in compliance with the provisions of 42 U.S.C. 1485(g). The Agency notes paragraph VI C of Exhibit C provides essential information necessary to interpret that the required demonstration of need applies to past operating costs of the project itself or to specified comparable cost data, whatever is less. The Agency contends that the use of the term "incurred costs" in the enabling legislation cited prevents the Agency from authorizing rent increases in the budget based on projection estimates, however realistic or reasonable. The Agency contends; however, that the law affords the Agency the authority to approve rent increases based on written notice of an actual increase to take effect for the project on a date certain; or based on written notices of a minimal level of actual increase known to be implemented on a date certain, or within a short period of a date certain. The Agency contends that the nature of such a written notice is sufficient to enable the Agency to administratively interpret as being in compliance with the law and the implementing regulations. The Agency contends such evidence would

not constitute a projection estimate, as an actual level of increase is known and; consequently, the Agency concludes such information can be considered for budgeting purposes.

Concern surfaced that the provisions of 42 U.S.C. 1985(g) governing rent increases, apply to all projects, not just those approved after November 30, 1983. The Agency disagrees and contends the opening provisions of 42 U.S.C. 1985(g) convey that the limits on rents apply to newly constructed or substantially rehabilitated projects assisted after November 30, 1983.

Concern surfaced that rent increases based on actual costs dictate that the projects approved on or after November 30, 1983, will constantly be running deficits and owners will be restricted from recovering a return on investment. Recommendations included dropping the restrictions on rent increases, removing provisions prohibiting paying a return on owner's investment if such a return would produce a year-end deficit, and modifying the return on owner's investment to permit an 8 percent return—not only on the 5 percent minimum required capital investment—but also on the minimum 2 percent operating and maintenance capital contribution requirement. The Agency contends it cannot ignore the provisions of law, and drop regulations limiting rent increases to actual costs on projects approved on or after November 30, 1983. The Agency also contends the restrictions prohibiting payment of owner's return on investment if such payment would place the project in a year-end deficit, are appropriate. The Agency notes owners may properly seek approval of budgets which provide for rental rates which recognize sufficient proceeds to cover project expenses, authorized return on owner's investment and recovery of any project losses from a previous year. The Agency contends such provisions provide ample means to ensure owners will, in fact, be capable of realizing a return on investment in most instances.

#### Rental assistance (RA) in Exhibit E of Part 1930, Subpart C

Concern was surfaced that rental agents should not be able to remove an application from a waiting list for RA without the tenant's consent. Commentors indicated that tenants accepting occupancy, but still wanting the benefits of RA, should not be subject to having rental agents remove any application from an RA waiting list just because a rental agent determined that such removal would not cause a hardship on the tenant. The Agency



contends these provisions are appropriate and consistent with other regulatory provisions enabling rental agents to establish procedures to periodically purge their waiting lists. The Agency contends that regulations (7 CFR Part 1944 Subpart L) affording appeal rights to applicants provide sufficient protection against any improper removal of an application from an RA waiting list by a rental agent.

Concern was surfaced that the provisions of paragraph VI C 1 of Exhibit C of Part 1930, Subpart C are inconsistent with 42 U.S.C. 1485(c)(3). The Agency contends provisions of law limiting access to tenants other than very low income tenants is sufficiently flexible to permit occupancy by other than very low income tenants when no very low income tenants are on the waiting list for projects with units where RA is available, or when no very low income tenants are in the market area. The Agency contends that the Secretary has sufficient authority to implement such provisions and that such provisions are consistent with the goals and objectives of the enabling legislation. The Agency contends that the law affords this flexibility in this instance because the alternative is to threaten the financial viability of a project. The Agency contends it would be unwise to issue regulations which may provide no means to fill vacant rental units under certain unusual market conditions. The Agency contends the proposed rulemaking provisions are prudent, practical, and in compliance with the letter and spirit of the enabling legislation.

Concern was surfaced regarding the appropriateness of permitting RA to be suspended, cancelled and/or transferred due to liquidation or failure to fulfill critical servicing responsibilities. The Agency contends such provisions are appropriate for consideration and that adequate protection against any arbitrary cancellation of RA by the Agency is provided under the Agency's appeal procedures.

Concern was surfaced that first priority in assigning RA in operational projects should be given to existing low income tenants where there is a rent overburden. The Agency contends it is appropriate to establish first priority of RA to very low income households.

Concern was surfaced that the eligibility requirements for RA need amendment to allow extension of RA to persons based on 25 percent of adjusted income as defined prior to implementation of a new rulemaking action. The reasons for such a recommendation centered on the view that 42 U.S.C. 1490(a) was designed to

avoid a tenant's rental increase above 10 percent regardless of whether such cause resulted from redefining adjusted income and/or raising the required tenant housing contribution level to 30 percent of adjusted income. The Agency disagrees with the interpretations offered. The Agency considers its proposed rulemaking action to be legally sufficient. The Agency agrees that the law requires a 10 percent cap on rental increases caused by HURRA regardless of whether caused by redefining adjusted income or raising the required tenant housing contribution level from 25 percent to 30 percent of adjusted income.

#### List of Subjects

##### 7 CFR Part 1930

Accounting, Administrative practice and procedure, Grant programs—housing and community development, Loan programs—housing and community development, Low and moderate income housing—rental, Reporting requirements.

##### 7 CFR Part 1944

Administrative practice and procedure, Aged, Farm labor housing, Grant programs—housing and community development, Handicapped, Loan programs—housing and community development, Low and moderate income housing—rental, Migrant labor, Mortgages, Nonprofit organizations, Public housing, Rent subsidies, Rural housing.

##### 7 CFR Part 1951

Account servicing, Accounting, Loan programs—housing and community development, Low and moderate income housing loans—servicing, mortgages.

##### 7 CFR Part 1965

Administrative practice and procedure, Low and moderate income housing—rental, Mortgages.

Accordingly, Chapter XVIII, Title 7, Code of Federal Regulations is amended as follows:

#### PART 1930—GENERAL

1. The authority citation for Part 1930 continues to read as follows:

Authority: 42 U.S.C. 1480, 7 CFR 2.23, 7 CFR 2.70.

#### Subpart C—Management and Supervision of Multiple Family Housing Borrowers and Grant Recipients

##### § 1930.101 [Amended]

2. Section 1930.101(d)(1) is amended by changing the reference. "Form FmHA 444-8" to read "Form FmHA 1944-8."

##### § 1930.102 [Amended]

3. Section 1930.102(h) is amended in the first sentence by removing the words "located on the same or contiguous site(s) and" and inserting the words "in one community such as a densely settled area, town or village" and by adding the words "under § 1965.68 of Subpart B of Part 1965 of this chapter" at the end of the last sentence.

##### § 1930.109 [Amended]

4. Section 1930.109 is amended in the last sentence by inserting the word "actions" between the words "servicing" and "will" and by placing a period after the word "chapter" and removing the remainder of the sentence.

##### § 1930.110 [Amended]

5. Section 1930.110 introductory text is amended by inserting the words "Periodic group meetings with borrower;" between the words "meetings;" and "analysis."

6. Section 1930.110(a)(4) is amended in the first sentence by inserting the word "and" between the words "plan" and "to."

7. Section 1930.110(a)(5) is amended by changing the spelling of "personal" to "personnel."

##### § 1930.117 [Amended]

8. Section 1930.117(b)(3) is amended by inserting the words "and conduct" between "Develop" and "training" and by adding the letter "s" to the word borrower.

9. Section 1930.117(b)(5) is amended in the second sentence by changing the spelling of "benefitting" to "benefiting" and by replacing the words "made available to" with the words "offered to or accessible by."

10. Section 1930.117(b)(6) is amended by replacing the words "to assure" with the word "for."

11. Section 1930.117(c) introductory text is amended in the first sentence by replacing the word "officers" with "chiefs."

##### § 1930.119 [Amended]

12. Section 1930.119(a) introductory text is amended in the first sentence by inserting the words "or other FmHA authorized persons" between the words "officials" and "will."

13. Section 1930.119(b)(1) is amended in the second sentence by adding the words "or other FmHA authorized person" between the words "person" and "will."

14. Section 1930.119(b)(2) is amended in the first sentence by inserting the words "or other FmHA authorized person" between the words "Director"



and "will" and by removing the words "a biennial" and inserting "an" in their place and inserting words "at least once every three years" between the words "project" and "with."

15. In § 1930.119, paragraphs (d) and (e) are redesignated as (e) and (f) respectively, paragraph (c) is revised and a new paragraph (d) is added to read as follows:

**§ 1930.119 Supervisory visits and inspections.**

(c) *Preparation.* The person planning to make the visit and inspection will review the most recent monthly or annual reports, the running records, correspondence and other District Office records to be fully aware of the supervisory needs of the project. This awareness should be developed into an informal visit plan and include, but not be limited to such things as: payment status, subsidy status, due dates of taxes and insurance, adequacy of fidelity bond, and any known maintenance problems.

(d) *Conducting visit or inspection.* The person making the visit or inspection should spend sufficient time at the project to accomplish the visit plan and any additional needs that are observed or brought out by the tenants or management staff.

16. In § 1930.119 newly redesignated paragraph (f) is amended in the first sentence by adding the words "or other FmHA authorized person" between the words "member" and "will."

**§ 1930.124 [Amended]**

17. Section 1930.124 introductory text is amended at the end of the last sentence by removing the period (.) and inserting a colon (:) in its place.

18. Section 1930.124(a)(3) is amended in the first sentence by removing the words "full fiscal year of" and inserting in their place the words "six months of successful".

19. Section 1930.124(b) introductory text is amended in the first sentence by removing the words "and will consist of" and inserting the punctuation and words ", or any extension authorized in writing by the District Director. The report will consist of:"

20. Section 1930.124(c) introductory text is amended in the third sentence by adding the words "or A-128" between the words "OMB Circular A-102" and "will be acceptable" and is amended in the fourth sentence by inserting the words "through the State Office" between the words "referred" and "to."

21. Section 1930.124(c)(1) is amended in the first sentence by placing a period

(.) after "1970" and by removing the remainder of the sentence and by removing the word "closely" from the second sentence.

22. Section 1930.124(d)(1)(iii) is amended by changing the reference "§ 1930.119(b)" to read "§ 1930.119(b)(2)".

23. Section 1930.124(f)(1) is amended by revising the last sentence to read: "In cases where the District Director does not have delegated authority, the State Director or state staff delegate will approve Form FmHA 1930-7."

24. Section 1930.125 is added to read as follows:

**§ 1930.125 Changing project designation.**

Generally projects designated for families, elderly or handicapped persons will be used for the original purpose throughout the life of the FmHA loan. However, if it becomes necessary to change the designation of a project due to housing market changes which inhibit the borrower's ability to maintain occupancy levels sufficient to sustain the project, the State Director may change the designation with the prior written concurrence of the National Office. No change in the plan of operation (limited profit, nonprofit or full profit) will be authorized in conjunction with the change in project designation. Project design must meet elderly housing requirements when changing the designation to elderly. A LH project cannot be designated as a RRH project and a RRH project cannot be designated as a LH project. The National Office will only consider such requests on a case by case basis when all of the following information has been provided:

(a) The complete borrower case files have been submitted together with the State Director's specific recommendations and analysis of the present and long term situation.

(b) A market needs survey which substantiates the rationale for the change has been provided by the borrower. (The market survey must clearly indicate the long term marketability of the project and include the appropriate demographic information which reflects the population trends in the area.)

(c) A summary of all servicing actions taken by FmHA to aid the borrower in maintaining the present designation.

(d) A summary of all actions taken by the borrower to effectively market the units to potential eligible tenants.

(e) A summary of the impact the change will have on any existing tenants, rent subsidy needs, and the community as a whole.

**§ 1930.141 [Amended]**

25. Section 1930.141(i)(6) is amended by changing the reference "Form FmHA 444-8" to read "Form FmHA 1944-8".

**§ 1930.143 [Amended]**

26. Section 1930.143 is amended by designating the text as paragraph (b) and by adding a new paragraph (a) to read as follows:

**§ 1930.143 Delegation of responsibility and authority.**

(a) The Administrator may on an individual state basis, authorize the State Director to contract out selective fact gathering, non-decision making servicing actions in this subpart.

27. Exhibit A to Subpart C is amended in the last paragraph entitled "Summary" by changing "VII" to "VIII" before the word "Summary."

28. Exhibit A-1 to Subpart C is amended to change "45" to "60" wherever it occurs.

29. Exhibit B to Subpart C is revised to read as follows:

**Exhibit B of Subpart C.—Multiple Housing Management Handbook**

*Table of Contents*

- I. Purpose.
- II. Definitions.
- III. Borrower Responsibilities.
- IV. Rent Subsidy Opportunities.
- V. Management Operations.
- VI. Renting Procedure.
- VII. Verification and Certification of Tenant Income and/or Employment.
- VIII. Lease Agreements.
- IX. Rent Collection.
- X. Maintenance.
- XI. Rent Changes.
- XII. Borrower Project Budgets.
- XIII. Accounting and Reporting Requirements and Financial Management Analysis.
- XIV. Termination of Tenancy and Eviction.
- XV. Security Servicing.

**EXHIBITS**

Title	Exhibit
Management Plan Requirements for FmHA Multiple Family Housing Projects.....	B-1
Requirements for Management Agreements.....	B-2
Management Agreement for FmHA Multiple Family Housing Projects.....	B-3
Questionnaire for Prospective Management Agent of a Multiple Family Housing Project.....	B-4
Questionnaire for Owner Who Proposes Owner-Management of a Multiple Family Housing Project.....	B-5
Monthly Reports (Chart).....	B-6
Annual Reports (Chart).....	B-7
Miscellaneous Reports or Submittals (Chart).....	B-8
Employment Inquiry.....	B-9
Objective Guides to assist Management in Determining the Ability of Tenants to Sustain Relative Independence.....	B-10
Type of Living Environment Needed in Relation to Nature and Degree of Disability.....	B-IOA



## Multiple Housing Management Handbook

## I. Purpose

This management handbook prescribes the Farmers Home Administration (FmHA) regulations, policies and procedures for management of Rural Rental Housing (RRH), Rural Cooperative Housing (RCH), and Labor Housing (LH) projects to be used by multiple housing borrowers (owners) and applicants and their management agents and site managers. Several exhibits are included to provide clarification and guidance. These regulations are intended to assist borrowers in the successful operation of FmHA-financed rental projects.

## II. Definitions

A. **Adjusted Annual Income.** This is the income of the household members, who live or propose to live in the rental unit for the next 12 months, (including spouse or children of an elderly family in nursing homes or hospitals who would otherwise live in the unit), excluding:

1. \$480 for each member of the family residing in the household (other than the tenant or co-tenant or spouse of either, or foster children) who is under 18 years of age; or who is 18 years of age or older and is disabled, handicapped or a full-time student. The student must carry a subject load considered full time by the educational institution attended.

2. \$400 for any elderly family;

3. Total medical expenses in excess of 3 percent of annual family income may be deducted for any elderly family. The term "total medical expenses" includes:

a. Medical expenses the tenant anticipates incurring over the 12 months following the effective date of the certification;

b. Medical expenses not covered by insurance;

c. Examples of medical expenses are dental expenses, prescription medicines, medical insurance premiums, eyeglasses, hearing aids and batteries, the cost of a live-in resident assistant, monthly payments required on accumulated major medical bills including that portion of the spouse's or children nursing home care paid from tenant family income(s).

d. Reasonable attendant care and auxiliary apparatus expenses for each handicapped member of any family to the extent necessary to enable any member of such family (including such handicapped member) to be employed.

4. The amounts paid by the family for the care of minors under 13 years of age may be deducted. Deductions for these expenses are permitted only when such care is necessary to enable a family member to further his or her education or to be gainfully employed, including the gainful employment of the disabled or handicapped family member. When the deduction is to enable gainful employment the amount may not exceed the amount of income received from such employment. When the deduction is to facilitate further education, the amount must not exceed a sum reasonably expected to cover class time and travel time to and from classes. (Child support payments made on behalf of a minor child who does not reside

in the unit may not be deducted as a child care expense.)

B. **Adjusted Monthly Income.** This is the amount obtained by dividing the adjusted annual income by 12.

C. **Annual Income.** Annual income is the gross amount of income to be received by all members of the household to be in residence during 12 months following the effective date of Form FmHA 1944-3, "Tenant Certification."

1. **Income Included.** The following are included when determining annual income:

a. The gross amount (before any deductions) of wages and salaries, overtime pay, commissions, fees, tips, and bonuses of all members of the household.

b. The net income from operations of a business or profession or from rental of real or personal property. Expenditures for business expansion or amortization of indebtedness are not considered in the computation of net income. Net losses will be completed as zero. Deductions from gross business or rental income to arrive at net income may be made in the same manner as outlined in Internal Revenue Service (IRS) regulations for the exhaustion, wear and tear, and obsolescence of depreciable property used in the trade or business of the adult household members under the straight line method of depreciation. An itemized schedule must be provided in support of any deductions from gross income made under the provisions of this section. The schedule should be consistent with the amount of depreciation permitted for these items for Federal income tax purposes under the straight line method of depreciation.

c. Interest, dividends, and other income from net family assets as defined in paragraph II W of this Exhibit. On contracts for sale of real estate, deeds of trust or mortgages held by the applicant or tenant, only the interest portion of the monthly or annual payments received by the applicant or tenant is included as income.

d. The full amount of periodic payments received from Social Security (including Social Security payment received by adults on behalf of minors or by minors intended for their own support), annuities, insurance policies, retirement funds, pensions, disability or death benefits (except lump sum settlements) and other similar types of periodic receipts.

e. Payments in lieu of earnings, such as unemployment and disability compensation, worker compensation and severance pay.

f. Periodic and determinable allowances, such as alimony and child support payments, which the applicant or tenant can reasonably expect to receive.

g. Regularly recurring contributions or gifts received from persons not residing in the dwelling.

h. Any amount of education grants or scholarships or Veterans Administration benefits on behalf of tenant, co-tenant, applicant, or other adult available for subsistence after deducting expenses for tuition, fees, books and equipment.

i. All regular pay, special pay (except for persons exposed to hostile fire) and allowances of a member of the armed forces who is head of the family or spouse, whether or not that family member lives in the unit.

j. Public Assistance. If the public assistance payment includes an amount specifically designated for shelter and utilities and that amount is subject to adjustments by the Public Assistance Agency according to the actual cost of shelter and utilities, the amount of public assistance income to be included as income shall consist of:

(1) The total amount of the public assistance, minus the amount specifically designated for shelter and utilities; plus

(2) The maximum amount which the Public Assistance Agency could in fact allow the family for shelter and utilities.

## Example

Total Grant.....	\$300
Amount specifically designated for shelter and utilities.....	-150
Amount of grant excluding shelter and utility allowance.....	150
The maximum the agency could provide for this family for shelter and utility allowance.....	+180
Amount per month to be included in Annual Income.....	330

2. **Exempted Income.** The following are not included in annual income:

a. Income of dependent minors under 18 years of age except as specified in paragraph II C 1 d of this Exhibit. (Tenant or co-tenant or spouse of either may never be considered minors.)

b. In the case of contracts for sale of real estate, mortgages or Deeds of Trust held by the tenant or co-tenant, the principal portion of the payments received by the tenant or co-tenant.

c. The value of the allotment provided to an eligible household under the Food Stamp Act of 1977.

d. Payments received for the care of foster children.

e. Casual, sporadic or irregular gifts.

f. Lump-sum additions to family assets such as inheritances, capital gains, insurance payments included under health, accident, hazard or worker compensation policies, and settlements for personal or property losses.

g. Amounts which are granted specifically for, or in reimbursement of, the cost of medical expenses. Medical expenses may include those expenses incurred by disabled or handicapped residents so that they may live independently (e.g., attendant care).

h. Amounts of education scholarships paid directly to the student or to the educational institution, and amounts paid by the Government to a veteran for use in meeting the costs of tuition, fees, books, and equipment. Any amounts of such scholarships or veterans payments, which are not used for above purposes and are available for subsistence, are considered to be income of tenant, co-tenant or applicant.

i. Student loans.

j. The hazard duty pay to a service person head of a household or spouse away from home and exposed to hostile fire.

k. Payments received pursuant to participation in the following programs:



(1) Programs under the Domestic Volunteer Service Act of 1973 including, but not limited to, the National Older Americans Volunteer Programs (OAVP) of the Federal Action Agency for persons age 60 and over including the:

(i) Retired Senior Volunteer Program (RSVP).

(ii) Foster Grandparent Program (FGP).

(iii) Senior Companion Program (SCP).

(iv) Older American Committee Service Program.

(2) National Volunteer Antipoverty Programs such as VISTA, Peace Corps, Service Learning Program and Special Volunteer Programs.

(3) Small Business Administration Programs such as the National Volunteer Program to Assist Small Business and Promote Volunteer Service to Persons with Business Experience, Service Corps of Retired Executives (SCORE) and Active Corps of Executives (ACE) and,

(4) Title V—Community Service Employment for Older Americans which include:

(i) Senior Community Service Employment Program

(ii) National Caucus Center on Black Aged

(iii) National Urban League

(iv) Association National Pro Personas Mayores

(v) National Council on Aging

(vi) American Association of Retired Persons

(vii) National Council of Senior Citizens

(viii) Green Thumb.

l. Relocation payments made pursuant to Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

m. Payments received under the Alaska Native Claims Settlement Act.

n. Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes.

o. Payments or allowances made under the Department of Health and Human Services Low-Income Home Energy Assistance Program.

p. Payments received from the Job Training Partnership Act.

q. Income derived from the disposition of funds of the Grand River Bank of Ottawa Indians.

r. The first \$2,000 of per capita shares received from judgment funds awarded by the Indian Claims Commission or the Court of Claims, or from funds held in trust for an Indian tribe by the Secretary of Interior.

s. Any funds which a Federal statute specifies must not be used as the basis for denying or reducing Federal financial assistance or benefits to which the recipient would otherwise be entitled.

D. *Borrowers*. "Borrowers" means owners who may be individuals, partnerships, cooperatives, trusts, public agencies, private or public corporations and other organizations and have received a loan or grant from FmHA for LH, RRH, RCH, or RHS purposes.

E. *Caretaker*. The individual(s) employed by the borrower or the management agent as specified in the management plan to handle normal maintenance and upkeep of the project.

F. *Chore Service Worker*. An individual who provides intermittent assistance essential to the well being of a tenant whose services are compensated by a Federal, State, or local assistance program. A chore service worker will not be a resident of the tenant's living unit.

G. *Congregate Housing*. Housing that affords an assisted independent living environment that offers the elderly, disabled or handicapped person who may be functionally impaired or socially deprived, but in good health (not acutely physically ill), the residential accommodations, central dining facilities, related facilities, and supporting service(s) required to achieve, maintain, or return to a semi-independent life style and prevent premature or unnecessary institutionalization as they grow older. Congregate housing also includes:

1. Housing which has complete kitchen facilities in each unit. However, some or all of the units may have limited kitchen facilities such as a cooktop with a small oven and a refrigerator. In the case of group living arrangements, each single family dwelling is considered a unit.

2. A group living arrangement where one or more elderly, disabled or handicapped persons may share living space within a rental unit and in which a resident assistant is required. Such housing may be one or more single family dwellings or a multi-unit structure.

H. *Domestic Farm Laborers*. Persons who receive a substantial portion of their income as laborers on farms in the United States, Puerto Rico, or the Virgin Islands and either (1) are citizens of the United States, or (2) reside in the United States, Puerto Rico, or the Virgin Islands after being legally admitted for permanent residence, and may include the immediate families of such persons, and as further defined in Subpart D of Part 1944 of this chapter.

I. *Elderly (Senior Citizen)*. A person who is at least 62 years old. The term elderly (senior citizen) also means persons with the following handicapped or disabilities, regardless of age:

1. *Handicapped*. a. Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which:

(1) Has lasted or can be expected to last for a continuous period of not less than 12 months, or which can be expected to result in death;

(2) Substantially impedes the ability to live independently; and

(3) Is of such a nature that such ability could be improved by more suitable housing conditions.

b. In the case of a blind person who is at least 55 years old (within the meaning of "blindness" as determined in Section 223 of the Social Security Act), is unable because of the blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he/she has previously engaged with some regularity over a substantial period of time.

2. *Disabled*. In the case of developmental disability, a person with a severe, chronic disability which:

a. Is attributable to a mental or physical impairment or combination of mental or physical impairment;

b. Is manifested before the person attains age 22;

c. Is likely to continue indefinitely;

d. Results in substantial functional

limitations in three (3) or more of the following areas of major life activity:

(1) Self care,

(2) Receptive and expressive language,

(3) Learning,

(4) Mobility,

(5) Self-direction,

(6) Capacity for independent living,

(7) Economic self-sufficiency; and

e. Reflects the person's need for a combination and sequence of special, interdisciplinary or generic care, or treatment, or for other services which are of lifelong or extended duration and are individually planned and coordinated.

J. *Elderly Family*. A household where the tenant or co-tenant is at least 62 years old, disabled or handicapped as defined in paragraph II I of this Exhibit. An elderly family may include a person(s) younger than 62 years of age who is essential to the elderly, handicapped or disabled person's care and well-being. (To receive an elderly family deduction the elderly, disabled or handicapped person must be the tenant or co-tenant.)

K. *Eligibility Income*. The calculated adjusted gross income which is compared to the income limits in Exhibit C to Subpart A of Part 1944 of this chapter.

L. *Forms Manual Insert (FMI)*. A type of directive which includes a sample of the form and complete instructions for its preparation, use and distribution.

M. *Household*. One or more persons who maintain or will maintain residency in one rental unit, but not including a resident assistant or chore service worker.

N. *LH* means Farm Labor Housing loans and/or grants.

O. *Low-Income Household*. A household having an adjusted annual income within the maximum low-income limit stated in Exhibit C of Subpart A of Part 1944 of this chapter (available in any FmHA Office).

P. *Management Agent*. The firm or individual engaged by the borrower to manage the project in accordance with a written agreement.

Q. *Management Agreement*. The written agreement between the borrower and management agent setting forth the management agent's responsibilities and fees for management services.

R. *Management Fee*. The compensation for providing overall management services for a Multiple Family Housing (MFH) project. The fee is compensation for the time, expertise and knowledge required to direct and oversee the present and future operation of the project. Project management fees may include the cost of day-to-day reasonable management activities of the project such as (1) developing and modifying operating budgets, (2) renting the units, (3) collecting the rent, (4) preparing reports to FmHA, (5) normal bookkeeping, (6) maintaining tenant records, (7) arranging for the proper



maintenance of the project, and (8) making inspections, etc. A management fee does not include the compensation paid to a site manager.

**S. Management Plan.** The primary management charter, constituting a comprehensive description of the detailed policies and procedures to be followed in managing a project.

**T. Migrant.** A domestic farm laborer who works in any given local area on a seasonal basis and relocates his or her place of residence as farm work is obtained in other areas during the year.

**U. Minor.** The term *minor* includes persons under 18 years of age other than the tenant or co-tenant. Persons aged 18 and over who are full-time students are treated as minors. The tenant or co-tenant may never be counted as a minor.

**V. Moderate-Income Household.** A household having an adjusted annual income within the maximum moderate-income limit stated in Exhibit C of Subpart A of Part 1944 of this chapter (available in any FmHA Office).

**W. Net Family Assets.** Net Family Assets includes: 1. The value of equity in real property, savings, demand deposits, and the market value of stocks, bonds, and other forms of capital investments, but exclude:

a. interests in Indian trust land,  
b. the value of necessary items of personal property such as furniture and automobile(s), and the debts against them,

c. the assets that are a part of the business, trade, or farming operation in the case of any member of the household who is actively engaged in such operation, and

d. the value of a trust fund that has been established and the trust is not revocable by, or under the control of, any member of the household, so long as the fund continues to be held in trust.

2. The value of any business or household assets disposed of by a member of the household for less than fair market value (including disposition in trust, but not in a foreclosure or bankruptcy sale) during the two years preceding the date of application, in excess of the consideration received therefor. In the case of a disposition as part of a divorce settlement, the disposition shall not be considered to be for less than fair market value if the household member receives important consideration not measurable in dollar terms.

3. Income from Net Family Assets which is included in Annual Income is determined as follows:

a. If Net Family Assets equals \$5,000 or less, Annual Income includes the actual income derived from the Net Family Assets.

b. If Net Family Assets exceeds \$5,000,

Annual Income includes the greater of:

(1) Actual income derived from all Net Family Assets, or

(2) A percentage of the value of such assets based on the Bank Passbook annual savings rate.

**X. New Housing.** Newly constructed or substantially rehabilitated RRH, RCH, or LH project financed by FmHA. For rental assistance (RA) purposes, it further means before any units are occupied.

**Y. Operational Housing.** A completed RRH, RCH, or LH Project financed by FmHA which

has been opened for occupancy and has at least been partially occupied by tenants.

**Z. Pet.** A commonly accepted domesticated household animal (such as a dog, cat, bird, etc.) owned or kept by a tenant.

**AA. Project.** A project is the total number of rental housing units in one community such as a densely settled area, town or village operated under one management plan with one loan agreement/resolution. The rental units may have been developed originally with separate initial loans and separate loan agreements/resolutions, now consolidated into one operational project according to § 1965.68 of Subpart B of Part 1965 of this chapter.

**BB. Rental Agent.** The individual responsible for the leasing of the units. If other than the borrower, this individual may be hired by the borrower, or the management agent as specified in the management plan.

**CC. Rental Assistance (RA).** RA, as used in this Exhibit, is the portion of the approved shelter cost paid by FmHA to compensate for the difference between the approved shelter cost and the monthly tenant contribution as calculated according to paragraph IV of this Exhibit. When the monthly gross tenant contribution is less than the approved utility allowance which is billed directly to and paid by the tenant, the owner will pay the tenant that difference according to paragraph IX A 2 of Exhibit E to this subpart.

**DD. Resident Assistant.** A person(s) residing in a housing unit who is essential to the well-being and care of the senior citizen(s) or handicapped person(s) residing in the unit and who is not related by blood, marriage or operation of the law to these tenants. The resident assistant is not considered to be part of the household and is not subject to the eligibility requirements of a tenant. The resident assistant receives compensation from sources other than FmHA. A resident assistant is not a chore service worker.

**EE. RCH** means Rural Cooperative Housing loans.

**FF. RSH** means Rural Housing Site loans.

**GG. RRH** means Rural Rental Housing loans.

**HH. Shelter Cost.** The approved shelter cost consists of basic and/or market rent plus utility allowance, when required. Basic and/or market rent must be shown on the project budget for the year and approved according to § 1930.124 of this subpart. Utility allowances, when required, must be determined and approved according to Exhibit A-5 to Subpart E of Part 1944 of this Subpart. Any change in rental rates or utility allowances must be processed according to Exhibit C to this subpart.

**II. Site Manager.** The individual employed by the borrower or the management agent who lives at or near the project site and is responsible for the day-to-day operations of the project. A site manager residing at the project site may also be referred to as a resident manager.

**JJ. Tenant.** A tenant also includes a co-tenant and is a person(s) who has signed a lease and is, or will be, an occupant of a unit in an RRH, RCH, or LH project. A person who has ceased to be an occupant, but whose personal property remains in the rental unit

will be considered a tenant until such personal property is removed voluntarily or by other legal means.

**KK. Tenant Contribution.** The portion of the approved shelter cost paid by the tenant household (tenant rent). For tenants not receiving HUD Section 8, this amount will be calculated according to Form FmHA 1944-8. For tenants receiving HUD Section 8, this will be the amount referred to on HUD Form 50059 "Certification and Recertification of Tenant Eligibility," (or other HUD approved Form), as family contribution. The proportion of tenant income and adjusted income paid as the tenant contribution will vary according to the type of subsidy provided to the household.

**LL. Very Low-Income Household.** A household having an adjusted annual income within the maximum very low-income limit stated in Exhibit C of Subpart A of Part 1944 of this chapter (available in any FmHA Office).

### III. Borrower Responsibilities

**A. General.** All borrowers are responsible for:

1. Understanding the distinction between FmHA supervised credit and the credit provided by other Federal, State, or conventional sources.
2. Meeting the objectives for which the loan and/or grant was made and complying with the respective program requirements.
3. Understanding the unique characteristics and function of their particular type of borrower entity as provided by charter, articles of incorporation, by-laws, and/or statute.
4. Assuring that a site manager or contact person is in close proximity to their MFH project.
5. Complying with the provisions of their security instruments and any directive issued by FmHA.

**B. Borrowers Without a Loan Agreement.** Unless otherwise specified, these borrowers are exempt from the requirements of this subpart, except for Exhibit C (Rent Changes), as long as the borrower is not in default of any program requirement, security instrument, payment, or any other agreement with FmHA. However, these borrowers must provide evidence of tenant income eligibility by properly completing a Form FmHA 1944-8 for each tenant as required by the FMI.

**C. Borrowers With a Loan and/or Grant Agreement.** These borrowers are responsible for meeting the requirements and conditions of their agreement/resolution and the requirements of this subpart.

**D. Borrowers With Governing Bodies.** The elected or appointed officials comprising the governing body of the borrower are responsible for:

1. Maintaining records of all current members and maintaining membership at the required level.
2. Holding meetings as required by the organizational documents, and as otherwise necessary, to provide proper control and management of its operations, and to keep the membership informed.

**E. Borrowers With a Membership.** Members of a membership type borrower are



responsible for full support of the project and operation by:

1. Promptly paying any dues, fees, and other required charges.
2. Electing responsible officials.
3. Complying with organization rules and regulations.
4. Participating in annual and special meetings.

**F. Delegation of Responsibility and Authority.** The borrower may delegate or assign management responsibilities to a property manager such as a management agent, a site manager, or as appropriate, a caretaker. Delegations or assignments of duties and responsibility will be included in written documents such as management agreements. FmHA will hold the borrower ultimately responsible for management of the project. FmHA may require a borrower to change the plan of project management and/or make appropriate redelegations of project management responsibility to achieve program objectives.

#### IV. Rent Subsidy Opportunities

The available subsidy programs should be considered at the time of developing a project proposal and during project operation as they may be available to meet the tenants' needs. These subsidy programs are as follows:

**A. FmHA Interest Credit—RRH and RCH Loans.** Regulations are contained in Exhibit B to Subpart E of Part 1944 of this chapter and include:

1. Plan I—Only those borrowers who received this type of interest subsidy prior to October 27, 1980, may continue to utilize this Interest Credit Plan. Those broadly-based nonprofit corporations and consumer cooperatives may continue operating under this plan provided:

a. Occupancy is limited to very-low- or low-income nonelderly; very-low-, low- and moderate-income elderly, disabled or handicapped persons.

b. Budgets and rental rates are based on a 3 percent loan amortization. The rent schedule consists only of "market" rental rates.

2. Plan II—This interest subsidy is available to broadly-based nonprofit corporations, consumer cooperatives, State or local public agencies, or to other organizations and individuals operating on a limited profit basis.

a. Occupancy is limited to very-low-, low- and moderate-income persons except as noted in paragraph VI B 2 e of this Exhibit.

b. Budgets are prepared for two rental rates, basic and market. The minimum (basic) rental rate for tenants not receiving rental assistance is based on a 1 percent loan amortization. The maximum (market) rental rate is based on the loan amortized at the interest rate shown in the promissory note.

c. Tenant's contribution for shelter cost, calculated according to the FMI for Form FmHA 1944-8, may not exceed the highest of:

- (1) Thirty (30) percent of monthly adjusted income, or
- (2) Ten (10) percent of gross monthly income, or
- (3) If the household is receiving payment for public assistance from a public agency, the portion of such payments which is

specifically designated by that agency to meet the household's shelter costs (Example in paragraph II C 1 j (2) of this Exhibit), or

(4) The basic rent where no RA is available.

d. Any tenant contribution increase caused by the change from 25 percent of the household adjusted income to the greater of c (1), (2), or (3) or by other provision of Federal Law or Federal regulation is restricted to not more than 10 percent in any 12 month period, as calculated on Form FmHA 1944-8, unless the increase above 10 percent is attributable to an increase in income.

e. RRH borrowers whose loans were approved on or after August 1, 1968, may convert from Plan I to Plan II. When they are presently a full profit operation, they may convert to Plan II by executing a new or amended loan resolution or loan agreement and an interest credit and agreement according to Exhibit B of Subpart E of Part 1944 of this chapter.

**B. Rental Assistance (RA) Program—FmHA.** This is a subsidy program available to RRH, RCH, and LH borrowers to assist very-low- and low-income tenants in paying their shelter cost. RA is not authorized for tenants whose adjusted income is above the low-income level. RA is not available to LH borrowers who are individual farmowners, partnerships, family corporations, or association of farmers. RRH borrowers with loans approved on or after August 1, 1968, must be operating under, or change to, Interest Credit Plan II to receive RA. Full Profit borrowers may utilize RA by converting to a Limited Profit operation. The provisions of the RA program are covered in detail in Exhibit E of this subpart.

**C. Department of Housing and Urban Development (HUD)—Section 8 Housing Assistance Payments Program.** This subsidy program is administered by HUD or the local public housing agency. Projects operating under the Memorandum of Understanding between FmHA and HUD (Exhibit H to Subpart E of Part 1944 of this chapter) will also be subject to the requirements of the Housing Assistance Payments (HAP) Contract executed by the borrower. Projects accepting tenants utilizing Section 8 assistance assigned by a local public housing agency will also comply with any requirements imposed by such agency. However, in all cases, tenants receiving Section 8 assistance must meet the eligibility requirements specified in paragraph VI B of this Exhibit. Requirements that conflict with FmHA requirements should be referred to the District Director for guidance. (Generally, the most restrictive HUD or FmHA requirements or limitations will apply.) Additional information on the HUD Section 8 program is contained in Exhibits G and H to Subpart E of Part 1944 of this chapter.

#### V. Management Operations

**A. Management Plan.** A comprehensive management program is essential to the successful operation of a project. A written plan is the primary ingredient which should describe the detailed policies and procedures in managing the project. *Unless program regulations specifically permit an exception, a management plan is required for:* (1) all

proposed multiple housing projects; (2) existing projects in which the loan, transfer, or reamortization, was approved after October 27, 1980; and (3) any other multiple housing projects where the State Director determines a management plan is needed because of loan delinquency or default, neglected maintenance, or known landlord-tenant problems. The plan should be developed in detail commensurate to project size and complexity and should be reviewed annually and updated by the borrower at least biennially. Exhibit B-1 of this subpart outlines the requirements of the plan. The following items, as a minimum, should be addressed in the plan.

1. The relationship between owner and management agent (when applicable).
2. Personnel policy and staffing arrangements.
3. Publicizing and achieving early occupancy through affirmative fair housing marketing and policies.
4. Tenant certification and verification of income.
5. Tenant admissions policies and leasing policies.
6. Rent collection.
7. Rent changes.
8. Maintenance.
9. Records maintenance and reports.
10. Energy conservation measures.
11. Tenant participation in project operations and tenants' relationship with management.
12. Termination of leases and evictions.
13. Management of Support Services to congregate and/or group home projects.
14. Management Background and/or Experience.
15. Management agreement (when applicable).
16. Management compensation.
17. Occupancy policy.

**B. Management Agreement.** The management agreement is the primary document by which the management agent is guided, evaluated, and compensated. It bears a close relationship to the management plan. A management agreement is required except in cases where the borrower (owner) fills the role of manager. Requirements of a management agreement are listed in Exhibit B-2 of this subpart. Exhibit B-3 of this subpart is a suggested management agreement. The two types of agreements acceptable to FmHA, are described as follows:

1. The owner hires a professional management agent to oversee and operate the project. The management agent may provide a site manager for onsite management and/or caretaker when justified by the size of the project. A qualifications statement by the management agent is required by the borrower and FmHA. Exhibit B-4 of this subpart provides a guideline for preparing the statement.

2. The owner maintains all or a part of the management role. The owner may use the services of a site manager in providing onsite management and/or services of a caretaker when justified by the size of the project. FmHA requires a qualifications statement by the owner who proposes to personally



provide the management to determine management capability. Exhibit B-5 of this subpart provides a guideline for preparing the statement.

**C. Responsibility.** The management plan and management agreement must be based on applicable provisions of local, State, and Federal statutes and the regulatory requirements of the loan used to finance the project, regardless of the management system used. The owner remains totally responsible to FmHA for the project, regardless of the authority delegated by the owner to the management agent.

**D. Compensation.** 1. *Projects with management agent.* The amount of compensation is to be negotiated between the owner and the management agent. The amount of compensation must be reasonable, typical when compared with similar services available in the area, and earned. The amount of compensation or "fee" should generally be stated on a monthly per occupied unit or as a percentage of rents collected for each occupied unit. Rents collected could include any RA and/or interest credit subsidy. The fee should vary from project to project depending upon size, complexity, services to be provided, type of project, age of loan and other relevant factors, such as comparable fees for similar projects in the area in which the project is located. The State and District Offices shall assemble data on comparable management fees in the District and State to be used as a basis for determining the fairness of fees negotiated between borrowers and management agents.

a. The management agreement must specifically define any project services to be provided that are to be paid directly from the Owner's Operating and Maintenance Account by the management agent but not included in the agent's management fee. These costs may include the following budget line items:

(1) Cost of salary and wages of the project's site manager and/or caretaker. (These persons will be hired and/or dismissed by the management agent.) The management plan must specify the duties of the site manager.

(2) Legal fees for the project.

(3) Auditing fees for the project.

(4) Repair and maintenance costs for the project.

b. The management agreement must also define costs that accrue to the management agent, but not directly to the project. The management fee will include costs such as:

(1) Monitoring project operations, training and supervision of on-site staff.

(2) Establishing a system to keep project books, reports, records, and accounts.

(3) Preparation and distribution of monthly reports.

(4) Preparation and distribution of annual reports of operations and maintenance.

(5) Preparation of requests for reserve withdrawal, rent adjustment, rehabilitation and energy conservation proposals, plans and specifications.

(6) Review of tenant certifications and submission of monthly RA requests. Assure protection of project receipts and make project invoice and payment disbursements.

(7) Management agent's office overhead including office space and utilities, clerical staff and training, agent's office bookkeeping, office supplies and equipment, transportation and telephone calls to projects, office data processing systems and postage.

(8) Supervision by management agent (time, knowledge, and expertise) of overall operations and capital improvements.

(9) Meeting with owners, investors, and/or lending agency.

(10) Development, preparation, and revision of management plans and/or agreements.

2. *Owner managed projects.* The owner will be authorized to manage the project only when FmHA determines in writing that the owner (either as the individual borrower or as a part of an organizational borrower) has the necessary management capabilities.

Projects with owners with identity-of-interest relationships to the management agent will not be considered as an owner managed project. A typical management fee may be charged as an expense to the project. The compensation must be according to the provisions of paragraph V D of this Exhibit and be reasonable, earned, and not exceed the normal cost of similar services, had such services been provided by an independent management agent.

3. *Initial Rent-Up Fees.* Payment of fees for a one-time effort to achieve initial rent-up of a newly constructed project is permitted when it is determined necessary and documented by the FmHA loan approval official and the loan applicant. Rent-up fees should be paid on a per-unit basis only after each unit has been occupied by the initial tenant. Payment of the rent-up fee and other project management start-up expenses should generally be made from the 2 percent initial operation and maintenance fund as follows:

a. In owner managed projects or when there is an identity of interest as defined in § 1924.4(h) of Subpart A of Part 1924 of this chapter between the management agent and the borrower, such as the owner or the owner's principals or family members owning an interest in the management firm (or vice versa), initial rent-up fees may be allowed but only up to reasonable actual cash expenditures.

b. When there is not an identity of interest, a person or firm, preferably the management agency, may be compensated at a rate negotiated with the applicant/borrower that represents reasonable compensation for the incurred marketing cost and project management start-up expenses.

**E. Site Manager and/or Caretaker Services.** The onsite services of a site manager and/or caretaker may be used when justified by the size, composition and location of a project, whether the project is managed by a management agent or by the owner. There should be a written agreement between the owner or the management agent and the site manager to define the role and duties of the site manager and to provide a basis for evaluating the site manager. FmHA may require an onsite resident manager and/or caretaker to assure that the loan objectives are met and/or to protect the tenant's or government's interests. It is desirable but not mandatory the site manager and/or caretaker

meet the tenant eligibility requirements for occupancy in the project.

1. *Calculation of rental rate for site manager or caretaker.* The associated cost of the unit occupied by the site manager or caretaker will always be reflected in the project budget the same as the cost for other non-revenue producing portions of the project. When the unit for the site manager or caretaker was authorized by the State Director according to the requirements of § 1944.212(g) of Subpart E of Part 1944, the unit may or may not be designated as part of the non-revenue producing facilities. This determination will be reflected in the project's management plan. The rental rate will then be determined as follows:

a. If the unit is planned and designed as a revenue producing unit, the compensation paid to the site manager and/or caretaker will be reflected in the operation and maintenance expenses of the project and will be included in the annual income of the site manager and/or caretaker. The site manager and/or caretaker's rent contribution will be based on their total income from all sources.

b. When a living unit is provided at a reduced cost to the site manager and/or caretaker in a plan II project, the rental of the unit will be considered to be basic rent. The portion of rent furnished by the project in the form of rent reduction below the basic rent will be recorded on FmHA budget forms. Debt payment will be as if the unit were rented at basic rent.

c. When a living unit was planned as a revenue producing unit but is provided at no cost to the site manager and/or caretaker in a Plan II project, the rental value of the unit will be considered to be basic rent. The associated cost of the unit will be treated the same as those of other non-revenue producing portions of the project. Project rental rates will be established as if the unit did not exist as living quarters. Debt payment will be as if the unit were rented at basic rent.

d. When a living unit is provided at no cost to the site manager and/or caretaker in a plan I or profit type project, the rental value of the unit will be considered to be the FmHA approved "market" rental value.

e. When the site manager and/or caretaker resides in a living unit and pays rent, the rental rate will be calculated as follows:

(1) If the site manager and/or caretaker meets the tenant eligibility requirements for the type of project being occupied, the appropriate rental rate will be the rate established for an eligible tenant in accordance with paragraph VI B of this Exhibit.

(2) If the site manager and/or caretaker does not meet the tenant eligibility requirements for the type of project being occupied because the site manager's and/or caretaker's adjusted annual income exceeds the maximum income limits, the site manager's and/or caretaker's appropriate rental rate for all projects except those operating under interest credit Plan I will be the FmHA approved market rental rate for the size of unit occupied. For interest credit Plan I projects, the appropriate rental rate will be the FmHA approved market rental



rate for the size of unit occupied, plus 25 percent.

f. If the unit was planned and designated as a non-revenue producing unit, it will be treated as any other essential facility for which loan funds were authorized so long as it is used according to the approved management plan. The operating costs, reserve payment and debt service for the manager or caretaker's unit will be budgeted as part of the overall cost of operation.

2. *Owner Occupancy.* Homeownership is not an objective of the FmHA multiple housing loan programs. With the prior approval of the State Director, owners may occupy a unit in the project when the owner will manage the project rather than hiring a management agent or a site manager. The size, composition, and location of the project must justify the services of a site manager or caretaker, and the State Director must determine the owner is capable of performing these services. The rental rate will be included as described in paragraph V E 1 of this Exhibit.

F. *Projects Without a Site Manager and/or Caretaker.* Projects without a site manager and/or caretaker must have, at a minimum, a tenant who will serve as a contact person or have a person who is easily accessible to the project who is able to represent the project manager or owner on maintenance and management matters.

#### VI. Renting Procedure

Preparations for initial rent-up, occupancy and maintenance will begin 90-120 days ahead of the projected completion date of the project. This procedure will include a pre-rent-up conference between the FmHA District Director, the borrower, and the person(s) responsible for project management. Decisions to be made concern the advertisement of available units, affirmative marketing practices, tenant eligibility, and tenant selection criteria.

A. *Affirmative Fair Housing Marketing Plan.* All borrowers with five or more rental units must meet the requirements of § 1901.203(c) of Subpart E of Part 1901 of this chapter by preparing and submitting an Affirmative Fair Housing Marketing Plan on HUD Form 935.2. Records must be maintained by the borrower reflecting efforts to fulfill the plan and will be subject to review by FmHA during compliance reviews for Title VI of the Civil Rights Act of 1964. The approved plan will be made available by the borrower for public inspection upon request at the borrower's place of business, rental office, or at any other location where tenant applications are received for the project. In developing the plan, the following items should be considered:

1. *Direction of Marketing Activity.* The plan should be designed to attract applications for occupancy from all potentially eligible groups of people in the housing marketing area regardless of race, color, religion, sex, age, marital status, national origin, or physical or mental handicap (must possess capacity to enter into legal contract). The plan must show that efforts will be made to reach very low-income, low-income group or groups who traditionally would not be expected to apply

for such housing without special outreach efforts.

2. *Marketing Program.* The applicant or borrower should determine which methods of marketing such as radio, newspaper, TV, signs, etc. are best suited to reach those very low-income, low-income group or groups who otherwise might not apply for occupancy in the project. The aging network such as the State and Area Agencies on Aging should be contacted to assist in reaching senior citizens.

a. *Signs, Brochures, Etc.* Any radio, TV or newspaper advertisement, signs, pamphlets, or brochures used must contain appropriate equal opportunity statements. A copy of this proposed material should be submitted along with the HUD Form 935.2 for approval. The nondiscrimination poster entitled, "And Justice For All" and/or the "Fair Housing" poster must be displayed in the rental office. If the rental office is not on site, the posters must be displayed in a common conspicuous place on the site.

b. *Community Contact.* Special interest groups such as community, public interest, and religious organizations should be contacted in small communities without formal communication media aimed at the group or groups least likely to apply for the available housing. Community contacts should also be used in reaching specific elements of the community such as the elderly or particular ethnic groups.

c. *Rental Staff.* All staff persons responsible for renting the units will be instructed in the procedures and requirements of the Affirmative Fair Housing Marketing Plan and in those actions necessary to carry out the plan promoting equal housing opportunity.

3. *Marketing Records.* The borrower will be required to provide data according to Subpart E of Part 1901 of this chapter, pertaining to compliance reviews, to indicate to what extent minority groups are being benefited.

B. *Tenant Eligibility.* The rental agent of the project must be knowledgeable about the FmHA tenant eligibility requirements as they relate to a particular project. FmHA loans require occupancy of the units by eligible tenants. Except for migrant farm worker tenants, tenant/applicants must certify on their application that the housing they will occupy is/will be their permanent residence. They will further certify that they do/will not maintain a separate subsidized rental unit in a different location.

1. *Eligible Tenants.* The following tenant eligibility criteria will apply where appropriate, unless otherwise authorized:

a. To determine eligibility for occupancy the applicant's income must be as defined in paragraph II K and include net family assets as defined in paragraph II W of this Exhibit.

b. The adjusted annual income must meet the definition of very low-, low- or moderate-income as defined in this Exhibit as required for that specific project for applicant selection, tenant contribution and continued occupancy.

c. To determine eligibility for continued occupancy, the tenant's Adjusted Annual Income must be determined at least once every 12 months. When the tenant's Adjusted

Annual Income exceeds the moderate-income limit established for the area in which the project is located, the tenant is no longer eligible and will be required to vacate the project according to the terms of the lease and paragraph VI B 5 of this Exhibit.

d. In RRH projects operating on a Plan I basis, tenants will:

(1) Be a very low-, low-, or moderate-income elderly, disabled or handicapped person.

(2) Be a very low or low-income nonelderly, nondisabled or nonhandicapped person.

e. In RRH projects operating on a nonprofit or limited profit Plan II basis, tenants will be a very low-, low-, or moderate-income person regardless of age, disability or handicapped condition.

f. In RRH projects operating on a full-profit basis, tenants will:

(1) Be an elderly, disabled or handicapped person of any income.

(2) Be a very low-, low-, or moderate-income nonelderly, nondisabled or nonhandicapped person.

g. In LH projects designed and operated either for year-round or seasonal occupancy, tenants will be domestic farm laborers.

h. Occupancy in RRH projects or those portions of RRH projects designated by FmHA as:

(1) Family housing may be by any combination of elderly, disabled or handicapped, and/or nonelderly, nondisabled or nonhandicapped tenants.

(2) Elderly housing must be by elderly, disabled and/or handicapped tenants but not restricted exclusively for use by disabled and/or handicapped tenants.

i. Tenant households must generally be capable of caring for themselves and must meet the following criteria:

(1) Not be totally dependent on others to be able to vacate the unit for their own safety in emergency situations. Tenant households are eligible for occupancy when a member of the household is disabled if adequate care and assistance is provided by the tenant household for the safety and well-being of the disabled household member.

(2) Possess the legal capacity to enter into a lease agreement, except in the case of tenants residing in a congregate housing project who have a legal guardian.

(3) Persons meeting the definition of elderly in paragraph II I of this Exhibit may be considered an eligible tenant or co-tenant if more suitable housing will improve their ability to live independently. The disability or handicap must be supported by a doctor's certificate and must meet one of the definitions in paragraph II I of this Exhibit. Receipt of veterans benefits for disability, whether service-oriented or otherwise, does not automatically establish disability. The owner/manager must make the determination based upon evaluation of the applicant's condition and the documentation presented.

j. In congregate housing projects, eligible tenants will include elderly, disabled or handicapped persons who require some supervision and central services, but are otherwise able to care for themselves. They must be able to provide for their own sustenance in projects that provide less than



a full meal program. The borrower will regularly assess the level of function and degree of competence of the tenant and/or co-tenant's ability in performing daily living activities. This assessment should enable the borrower to determine whether or not the tenant can maintain relatively independent occupancy given the supportive services in the project (see Exhibit B-10 to this subpart). The tenants must also meet the criteria found in paragraph VI B 1 h above.

k. For LH projects and units in RRH projects specifically designed and designated for the elderly, disabled and/or handicapped as defined by FmHA, occupancy is limited solely to those meeting the eligibility requirements for the specific type of project (i.e., domestic farm laborers, elderly, disabled and/or handicapped). Eligible occupants in these projects may also include other persons who are usually household members of the domestic farm laborer, elderly, disabled or handicapped person. Resident assistants or chore workers will not be considered to be members of the tenant household.

l. In a group home situation, a Resident Assistant may occupy separate living space of appropriate size without regard to income.

m. A student or other seemingly temporary resident of the community who is otherwise eligible and seeks occupancy in a RRH project may be considered an eligible tenant when all of the following conditions are met:

(1) Is either of legal age in accordance with applicable State law or is otherwise legally able to enter into a binding contract under State law.

(2) The person seeking occupancy has established a household separate and distinct from the person's parents or legal guardians.

(3) The person seeking occupancy is no longer claimed as a dependent by the person's parents or legal guardians pursuant to Internal Revenue Service regulations, and evidence is provided to this effect.

(4) The person seeking occupancy signs a written statement indicating whether or not the person's parents, legal guardians, or others provide any financial assistance and such financial assistance is considered as part of current annual income and is verified in writing by the borrower.

n. A former domestic farm laborer may continue occupancy of a LH project after retirement or after becoming disabled if the farm laborer was an eligible tenant living in the project prior to the event.

o. A tenant who does not personally reside in a unit for a period exceeding 60 consecutive days, for reasons other than health or emergency, is considered ineligible and shall be required to pay market rent in Plan II projects or 125 percent of rent in Plan I projects for the period of absence exceeding 60 consecutive days.

(1) If the tenant continues to be absent from the unit, the borrower must notify the tenant by certified mail at least 30 days prior to the end of the leasing period, to occupy the living unit by the end of the lease period or the borrower will start eviction proceedings.

(2) In those cases existing before the issuance of this subpart on December 19, 1983, where the tenant's lease does not contain the lease clause in paragraph VIII B 3 c of this Exhibit, the tenant will be advised that the lease will not be renewed.

2. *Occupancy Policy:* Occupancy policy in FmHA financed projects shall have the objective of effective utilization of space without overcrowding or providing more space than is needed by the number of people in the household.

a. The following occupancy standards are to be complied with to assure efficient use of the rental units developed with FmHA financing and apply to all RRH projects and to LH projects designed and operated for year-round occupancy:

Number of bedrooms	Occupants	
	Min	Max
0	1	2
1	1	2
2	2	4
3	4	6
4	6	8
5	8	10

b. The above occupancy standards may serve as general guidelines for migrant farm labor housing. Projects developed in compliance with local and/or state design requirements will determine the appropriate occupancy standards for migrant LH.

c. Without FmHA approval, management may assign a larger or smaller unit than the household needs if all the following conditions are met:

(1) No household, otherwise eligible and having the number of members appropriate to the unit, is available to occupy the unit and management has made a diligent effort to reach tenants who qualify for the larger or smaller size unit;

(2) The tenant agrees to transfer to the first correctly-sized unit if and when it becomes available in the project;

(3) The tenant agrees to pay all costs associated with the subsequent move; and

(4) The agreements in c (2) and c (3) of this paragraph are included in the tenant's lease.

d. Borrowers with RRH projects specifically built for the elderly prior to October 27, 1980, with only a few or no one-bedroom units, may permit occupancy of two bedroom units by single eligible tenants if this provision is included in the project occupancy policy. The occupancy policy should reflect the needs of the local market area. This eligibility determination made by management must be included in the tenant's lease and will entitle such tenant to all benefits without need for further FmHA approval.

e. When a unit cannot be rented under the provisions in paragraphs c and d above, the District Director may authorize an exception according to paragraph VI B 6 of this Exhibit.

f. A tenant who was determined eligible and allowed to occupy under regulations in effect prior to October 1, 1986, who does not meet eligibility requirements regarding income or borrower occupancy policy as prescribed in these regulations may be permitted continued occupancy in the same unit.

g. In the case of unusual household situations such as a single parent with older children of opposite gender the District Director may make an exception to paragraphs VI B 2 a through f on a case-by-

case basis and determine the household eligible.

h. For each RRH project specifically built for the elderly, the borrower or management may not:

(1) Prohibit, prevent, restrict or discriminate against any tenant who owns or keeps a pet in their apartment unit with respect to continued occupancy in the project unless the approved project pet rules are violated.

(2) Prohibit, prevent, restrict or discriminate against any applicant who owns a pet with respect to obtaining occupancy to the project.

3. *Other Items the Rental Agent Should Consider in Determining Eligibility of Applicants for Admission to the Project.* a. Credit reports to reflect the applicant's past record of meeting obligations.

b. Prior landlord references to determine if the tenant was responsive to meeting rent payment obligations, care, and maintenance of the unit.

c. Verification of income and/or employment according to paragraph VII of this Exhibit. This item is a requirement in all cases.

d. The applicant's financial capability to meet other basic living expenses and the rental charge, taking into consideration any subsidy assistance that could be made available to the tenant. Where RA is not available, any very-low or low-income household that would be required but unable to pay the approved rent, including utilities, may be eligible for some form of rent subsidy described in paragraph IV of this subpart if it is available in the area.

4. *Surviving Members of Eligible Tenant Household.* a. Surviving members of an elderly, disabled and/or handicapped tenant's household may continue occupancy of the unit even though they may not meet the definition of an elderly, disabled or handicapped person stated in paragraph II of this Exhibit, provided:

(1) They are eligible occupants in all other respects,

(2) They occupied the unit at the time that the original tenant ceased to occupy the unit, and

(3) The District Director determines on a yearly review basis that their continued occupancy will not be detrimental to the integrity of the project in the community.

b. Surviving members of a domestic farm laborer household may continue to occupy when they meet the definition of a domestic farm laborer as defined in paragraph II of this Exhibit. When they do not meet the definition, the provisions for formerly eligible tenants in paragraph VI B 5 of this Exhibit will apply.

5. *Formerly Eligible Tenants.* Unless authorized by paragraph VI B 2 f, formerly eligible tenants will be required to vacate their unit within 30 days (7 days for migrant farm labor tenants with week-to-week lease agreements) or the end of the term of their lease agreement, whichever is longer, when an eligible applicant is on the waiting list and is available for occupancy. If vacating the unit in the time period described creates an undue hardship on the family, the District



Director may permit continued occupancy for a reasonable period of time. The following "formerly eligible" situations apply to this paragraph:

a. Tenants who no longer meet FmHA income eligibility requirements. (This includes tenants receiving RA or Section 8 assistance.)

b. Tenants in LH projects who no longer meet the farm labor occupation requirement, except retired or disabled domestic farm laborers who are eligible tenants at the time of their retirement or becoming disabled may continue to occupy a project that they initially occupied as an eligible domestic farm laborer.

c. Tenants who no longer meet the occupancy policy for the project. These tenants must either move to a unit of appropriate size in the project, or when none is available, vacate the project at the termination of their lease.

6. *District Director Authority To Permit an RRH or LH Borrower To Rent to Ineligible Tenants.* a. The District Director may authorize the borrower in writing, upon receiving the borrower's written request with the necessary documentation, to rent units to ineligible persons for temporary periods to protect the financial interest of the Government. This authority will be for periods not to exceed one year. Within the period of the lease the tenant may not be required to move for any reasons of ineligibility. A copy of the authorization to rent to ineligible persons will be forwarded to the State Office. The following determinations must be made by the authorizing FmHA official.

(1) There are no eligible persons on a waiting list.

(2) The borrower provided evidence that a diligent but unsuccessful effort to rent any vacant unit(s) to an eligible tenant household has been made. Such evidence may consist of advertisements in appropriate publications, posting notices in several public places, and other places where persons seeking rental housing would likely make contact; holding open houses, making appropriate contacts with public housing agencies and authorities (where they exist), State and local agencies and organizations, Chamber of Commerce, and real estate agencies.

(3) The borrower will continue with aggressive efforts to locate eligible tenants and submit to the District Office, along with Form FmHA 1944-29, "Project Worksheet for Interest Credit and Rental Assistance," a report of efforts made. The required followup should be posted in the District Office on Form FmHA 1905-8, "Management System Card—Multifamily Housing."

(4) To protect the security interest of the Government the units may be rented for no more than a year after which the lease must convert to a monthly lease. The monthly lease must require that the unit be vacated when an eligible prospective tenant is available. The ineligible tenant will then be given 30 days to vacate.

(5) Tenants who are ineligible, because their household income exceeds the maximum for the project, will be charged the FmHA approved market rental rate for the size of unit occupied in a Plan II RRH project.

In projects operated under Plan I, ineligible tenants will be charged rental surcharge of 25 percent of the approved market rental rate.

(6) Tenants who are ineligible for reasons other than income may benefit from RA and/or interest credit if they are otherwise eligible in the same manner as an eligible tenant.

b. Examples of situations where the District Director may consider authorizing a borrower to rent units to ineligible persons when units cannot be returned to eligible persons are:

(1) Permitting occupancy by other eligible families in a project designed for, designated as, and limited to occupancy by eligible elderly, disabled, and/or handicapped persons.

(2) A household that does not meet eligibility requirements regarding income, i.e., an above moderate-income household.

c. When the District Director determines that a borrower may rent to an ineligible tenant, the written authorization must contain the appropriate clauses which must be inserted into the ineligible tenant's lease. At a minimum it should include:

(1) The reason for ineligibility.

(2) The term of ineligible occupancy.

(3) Any conditions under which the tenant will be required to vacate the unit including moving to an appropriate size unit when warranted to comply with the established occupancy standards.

(4) The length of notice the tenant will be given to vacate.

#### C. Maintenance of Inquiry and Waiting Lists.

1. When a prospective tenant inquires (by telephone, letter or visit) concerning the availability of a rental unit, the borrower or rental agent may place the prospect's name chronologically on an inquiry list. The list should contain enough information for future contact by mail or telephone. **THIS LIST DOES NOT ESTABLISH ANY PRIORITY.**

2. When a prospective tenant files an application for occupancy the borrower or rental agent will place the prospect's name chronologically on the appropriate written waiting list. An application is a written document(s) prescribed by the management providing sufficient information for the rental agent to complete the steps necessary to determine eligibility. The actual determination of eligibility will be conducted according to the application process described in paragraph VI D of this Exhibit.

3. Separate waiting lists by categories and/or a master waiting list with income levels identified (very low, low and moderate), and categories or priorities indicated will be maintained for rural rental and year-round occupancy farm labor housing. Each list must be maintained in chronological order. When there are separate lists, they must be cross-referenced for prospective tenants who fit more than one category or priority.

a. Separate lists may be maintained for:

(1) Income levels (very low, low, moderate, ineligible).

(2) Various size units.

(3) Units for elderly, disabled or handicapped persons, families, or any other combination as planned for the project according to the borrower's loan agreement or resolution.

(4) Persons who require the special design features of the handicapped units in the

project such as persons confined to a wheelchair. Persons on this list have priority for these units.

(5) Displacees, such as victims of natural disasters and eminent domain, to whom priority consideration may be given.

(6) In congregate housing projects, priority will be given to the frail or impaired eligible applicants to sustain an occupancy level of 25% to 35% of the project units. After this occupancy level is attained, priority will be given to non-frail or non-impaired applicants.

b. Separate waiting lists will be maintained for very low-income households who are eligible for RA. This list may be compiled from the filed applications or extracted from the master list.

4. For seasonal farm labor housing a waiting list should be chronologically compiled as in paragraphs VI C 1, VI C 2, and VI C 3 of this Exhibit. These lists should be maintained for the season in which the project will be operating. Prospective tenants should be advised that the waiting list will terminate on the closing date of the project in any given season.

a. Seasonal LH management plans should identify a date when applications will be accepted for a new operating season and a waiting list compiled.

b. A process should be specified in the plan for advising prospective tenants of the application process and the dates of project operation.

5. A Letter of Priority Entitlement (LOPE) issued by FmHA according to \$1965.90 of Subpart B of Part 1965 of this chapter entitles prospective tenants to move to the top of any waiting list for that appropriate unit size for which the applicant qualifies.

6. Each list by category will be available for inspection by prospective tenants on the waiting list. When prospective tenants are first assigned to the waiting list, they will be notified of the category(s) to be assigned to their application.

7. Borrowers may establish a procedure for purging the inquiry and waiting list(s) periodically of prospective tenants who are no longer interested in occupancy. The borrower must inform each prospective tenant of this procedure and any actions they must take to maintain their priority position on the waiting list. When a name is removed from the waiting list, the prospective tenant must be informed in writing at their last known address. The letter must include appeal rights under Subpart L of Part 1944 of this chapter.

#### D. Notification of Eligibility or Rejection.—

1. *Application Status for Determining Eligibility.* All persons desiring to apply for occupancy will be provided the opportunity to submit a complete application. The borrower or rental agent will provide prospective tenants with a written list of all information required for a complete application and offer assistance in completing the application if needed.

a. After the potential tenant has submitted all required forms and information but additional information is required, the borrower or rental agent must notify the applicant within 10 days of the items needed to complete a review of eligibility. The



application file will be documented on the action taken.

b. When an operational project has few or no vacancies, and there are sufficient active applications from households determined eligible to fill expected vacancies, the borrower may postpone verification of eligibility for new applicants.

c. While application fees are discouraged, any fee charged to a prospective tenant must be reasonable and limited to actual costs for obtaining necessary information.

2. *Application Requirements.* At a minimum to be considered complete, applications must include the following information for each prospective tenant household:

- Name and present address.
- Household income and eligibility income information, verified and certified according to paragraph VII of this Exhibit.
- Age and number of household members.
- Handicap status, if applicable.
- Race or ethnic group and sex designation.

(1) The borrower or management agent will request that each prospective tenant provide this information on a voluntary basis for statistical purposes only. When the applicant does not provide this information, the rental agent will complete this item based on personal observation or surname.

(2) The following disclosure notice shall appear on the tenant application form or on an amendment to the application:

"The information solicited on this application is requested by the apartment owner in order to assure the Federal Government, acting through its Farmers Home Administration, that Federal Laws prohibiting discrimination against tenant applicants on the basis of race, color, national origin, religion, sex, marital status, age, and handicap are complied with. You are not required to furnish this information, but are encouraged to do so. This information will not be used in evaluating your application or to discriminate against you in any way. However, if you choose not to furnish it, the owner is required to note the race/national origin and sex of individual applicants on the basis of visual observation or surname."

3. *Notification to Applicant.* The applicant who has submitted a completed application will be notified in writing that he or she has been selected, rejected, or placed on a waiting list.

4. *Applicants Determined Ineligible.* Applicants determined ineligible will be notified in writing of the specific reasons for rejection.

a. The rejection letter must also outline the applicant's rights under the FmHA Tenant Grievance and Appeals Procedures in Subpart L of Part 1944 of this chapter.

b. When the rejection is based on information from a Credit Bureau, the source of the Credit Bureau report must be revealed to the applicant in accordance with the Fair Credit Reporting Act.

c. Applicants may be rejected due to:

- (1) A history of unjustified and chronic nonpayment of rent and financial obligations.
- (2) A history of violence and harassment of neighbors.

(3) A history of disturbing the quiet enjoyment of neighbors.

(4) A history of violations of the terms of previous rental agreements such as the destruction of a unit or failure to maintain a unit in a sanitary condition.

d. Rejection of applicants on an arbitrary basis is prohibited. Examples of such arbitrary rejections are:

- (1) Race, color, religion, sex, age, marital status, national origin, physical or mental handicap (except in those projects or portions of projects designated for elderly, disabled and/or handicapped, where occupancy by nonelderly, nondisabled or nonhandicapped can be prohibited).
- (2) Receiving income from public assistance.
- (3) Families with children of undetermined parentage.
- (4) Participation in tenant organizations.

e. In the case of Labor Housing projects, no organization borrower other than an association of farmers or family farm corporation or partnership will be permitted to require that an occupant work on any particular farm or for any particular owner or interest as a condition of occupancy of the housing.

f. Rejected applications must be kept on file by the borrower or management agent until a compliance review has been conducted by FmHA in accordance with Subpart E of Part 1901 of this chapter.

E. *Tenant Selection.* 1. Applicants determined eligible will be selected on a firstcome-first-served basis according to the chronological order of each categorized waiting list or by chronological order of each income group identified on a master waiting list in the following priority:

- Very low-income.
- Low-income.
- Moderate-income.
- Ineligible.

2. When RA is available: a. Very low-income applicants eligible for RA have a priority over all other applicants on each type of waiting list maintained by the borrower in accordance with paragraph XI of Exhibit E to this subpart.

b. Low-income applicants may be selected provided no very low-income applicants remain on the waiting list.

c. Moderate-income applicants may not be selected where the number of unassigned RA units equals or exceeds the number of vacant units. (Borrowers unable to use RA may consider requesting a transfer of RA authority according to paragraph XV of Exhibit E.)

3. Selections will be made from the waiting list maintained for the particular unit size and/or unit type in which a vacancy exists. If the applicant cannot accept the unit at that time, the reason for not accepting the living unit will be documented. The applicant's name will then be removed from the waiting list unless the rental agent determines that hardship exists for reasons such as health problems or high cost of rent without RA in which case the applicant's name will remain on the list in chronological order. An applicant whose name has been removed from the waiting list may reapply.

4. When there are no applicant names on the waiting list for the size and/or type of

vacant living unit, a name may be selected from the waiting list of another size and/or type of living unit according to the date order of the application on the master waiting list. The selected tenant will be subject to the provisions for ineligible tenants found in paragraph VI B 6 of this Exhibit.

F. *Tenant Record File.* A separate file must be maintained for each tenant. This file will include items such as application, income verification forms, lease agreement and attachments, inspection reports for moving in and moving out, correspondence and notices to the tenant, and any other necessary information. The income verification, tenant eligibility certification and recertification information must be retained for at least 3 years while the tenant is living in the unit and for 3 years after the tenant has moved out.

#### VII. Verification and Certification of Tenant Income and/or Employment

The incomes reported by the tenants (and employment in the case of LH tenants) selected for occupancy must be verified by the borrower or rental agent before the tenant is determined eligible. If in unusual circumstances a tenant is allowed to move in before income is verified, the lease should contain a clause "subject to verification of income." Temporary verification may also be obtained through contacts with individuals who may be knowledgeable of the tenant's income. When no other verifiable source is available, a notarized affidavit from the tenant attesting to his/her gross annual income may be accepted.

A. *Verification of Income from Employment.* Verification of income from employment, authorized by the tenant/applicant, must be obtained from the employer in writing and filed in the "Tenant Record File." A suggested Employment Inquiry form is attached as Exhibit B-9.

B. *Verification of Income from Other Sources.* Any income from other than employment (e.g., social security, Veterans Administration, public assistance) must be verified in writing by the income source. Verification of income must be documented and filed in the "Tenant Record File." When it is not immediately possible to obtain the written verification from the income source, the income may be temporarily verified by actually examining the income checks, check stubs, or other reliable data the tenant possesses which indicates the tenant's gross income.

C. *Verification of Income and/or Employment for LH Tenants.* 1. Verification of income is required for those domestic farm laborers, including migrants, who will receive the benefits of RA. When the tenants do not have easily verifiable income, the borrower may project monthly income expected to be received by the tenant during occupancy for determining eligibility and subsidy assistance.

2. Verification that all LH tenants have sufficient income from farm labor employment, that meets the definition of domestic farm labor, is required for all domestic farm laborers, including migrants. Employment verification is an addition to income verification for those tenants



described in paragraph VII C 1 above. Verification must be documented and filed in the "Tenant Record File."

**D. Random Sample of Tenant Income and/or Employment Verification.** District Directors are required to make a random sample of tenant income verifications; in the case of LH tenants, employment verifications for use in evaluating the adequacy of such verifications. The random sample can be derived from information on the tenant certification forms that will be submitted to the District Office in accordance with paragraph VI F of this Exhibit. The random sample should be representative of very low-, low- and moderate-income persons in the project, including those receiving subsidy assistance, those paying in excess of the contribution level cited in paragraph IV A 2 c (1) or (2) or (3) of this exhibit for the costs of rent and utilities, and those paying the market rent. The District Director will conduct the random sample in the borrower's office during supervisory visits and at any time he/she may be knowledgeable of discrepancies in income and/or employment verifications. If the random sample discloses discrepancies, the District Director will be required to investigate further or report to the State Director to obtain the assistance of the Office of Audit or the Office of Investigations.

**E. Use of HUD Certification Form for Section 8 Recipients.** HUD Form 50059, or another HUD form approved by HUD for this purpose, may be used in lieu of Form FmHA 1944-8 for the tenants receiving Section 8 assistance. However, the tenant's income cannot exceed FmHA limits for the type of housing project involved if it has been calculated according to the formula contained in Form FmHA 1944-8.

**F. Certification of Tenant Income.** 1. Borrowers must provide a current tenant certification to the FmHA District Office (using Form FmHA 1944-8 or, when tenants receive section 8 assistance, the acceptable HUD form) before a tenant household can be considered an eligible tenant in a multihousing project.

2. The initial tenant certification must be submitted to the FmHA District Office on or before the day the tenant occupies the unit.

3. Any substantial change in income or change in family size requires a new tenant certification to be promptly filed with the FmHA.

4. Form FmHA 1944-8 must be processed as follows:

a. Borrower or their representatives may sign Form FmHA 1944-8 up to 60 days prior to the effective date.

b. Borrowers or their representatives are not to submit Form FmHA 1944-8 to the FmHA District Office more than one month (i.e., 30 days) preceding the effective date.

c. The FmHA District Office reviews each Form FmHA 1944-8 submitted and verifies that the information is complete and correctly computed based on the information provided on the form.

d. The FmHA approved tenant certifications have an effective period of 12 months. The effective period begins on the effective date which is always the first day of the month.

5. Each tenant must be recertified within 12 months of the previous certification. Tenants receiving Section 8 assistance will be recertified according to HUD regulations.

a. The borrower must: (1) Notify the tenant that a current tenant certification and income verification is required before the due date and explain the procedure necessary to accomplish recertification. Normally this initial written notice will be sent 75 to 90 days prior to the expiration date of the current tenant certification;

(2) Process the appropriate tenant certification and verification of income; and (3) Submit the signed recertification to the District Office by the due date.

b. The borrower must provide a second written notice to the tenant 30 days prior to the due date if the tenant has not responded. The second notice must advise the tenant that without a current tenant certification, the tenant will be required to pay market rent and that eviction proceedings may be started as of the due date since an annual recertification is required for continued occupancy. If the tenant has RA, the tenant must be advised that without a current certification, the tenant's RA will be cancelled and may not be immediately available for reinstatement should a proper tenant certification be provided at a later date.

c. When an eviction notice has been served on a tenant for failure to recertify, the borrower must provide a copy of the eviction notice to the District Office as required in paragraph XIV B of this Exhibit. If the District Director does not receive a new tenant certification on such tenant(s) the Director will annotate the project master list with an E beside the "Expiration Date of Tenant Certification" on Form FmHA 1944-29 for the appropriate tenant(s). The District Director will continue to authorize interest credit and waiver of overages while the eviction is being actively pursued until resolution of the eviction. The RA will be suspended during the eviction process. Upon conclusion of the eviction process the RA will either be reinstated or given to another tenant.

6. The borrower must submit Form FmHA 1944-29 to the District Office with each payment, report of overage or request for RA as required in paragraph XIII C 1 b of this Exhibit. The calculations on Part II of the form must be for tenants in residence on the first day of the month for which the payment or request is submitted. All calculations will be made as if the tenant will be in residence for the full month. ADJUSTMENTS WILL NOT BE MADE TO THE BORROWER'S SUBSIDY, PAYMENT OR CHARGES FOR OVERAGE FOR TENANTS MOVING IN OR OUT AFTER THE FIRST OF THE MONTH.

7. Paragraph VIII B 3 b of this Exhibit is a required lease provision requiring tenants to notify the management of any permanent change in adjusted monthly income or size of household. Upon receipt of such notice, the borrower must promptly obtain a new tenant certification and income verification and submit it to the District Office.

8. When a borrower/agent believes that an applicant/tenant certification and income verification is inaccurate, they may provide the information including the tenant's social

security number to the District Office requesting a further verification through the appropriate state employment agency. The District Office will forward the request to the State Director for submission to the state agency that keeps records on the incomes of wage earners. The State Director will develop a method of obtaining the information from the state agency.

#### VIII. Lease Agreements

A Lease Agreement is a written contract between the tenant and landlord assuring the tenant quiet, peaceful enjoyment and exclusive possession of a specific dwelling unit in return for payment of rent and reasonable use and protection of the property.

**A. Form of Lease.** Each State Director is encouraged to prepare a sample lease form complying with individual State laws and FmHA requirements. The State Director may incorporate clauses which meet a specific need in compliance with State law. Any sample lease must be reviewed and approved by the OGC before being provided to borrowers as a guide for preparing an acceptable project lease.

1. All leases will be in writing and must cover a period of at least 30 days but not more than one year, except that leases for LH may be weekly where occupancy is typically seasonal. In areas where there is a concentration of non-English speaking individuals, leases and the established rules and regulations for the project written in both plain English and the non-English concentration language must be available to the tenants. The tenant should have the opportunity to examine and execute either form of lease.

2. Annual leases should contain an appropriate escalation clause permitting changes in basic and/or market rents prior to the expiration of the lease. Rent changes would normally be necessary due to changing utility and other operating costs. Any changes must be approved by FmHA according to Exhibit C of this subpart.

3. The form of lease to be used by the borrower and any modifications of the lease form must be approved by the FmHA District Director. When submitting a lease form for FmHA approval, it must be accompanied by a letter from the borrower's attorney regarding its legal sufficiency and compliance with State law and FmHA regulations.

4. A copy of a properly completed and approved Exhibit A-5, "Housing Allowances for Utilities and Other Public Services," of Subpart E of Part 1944 (when the tenant will pay utilities) and a copy of the established rules and regulations for the project will be provided to the tenant as attachments to the lease.

5. A copy of a properly completed and signed Form FmHA 1944-8 or HUD Form 50059 for those tenants receiving HUD Section 8 tenant subsidy, will be used to calculate each tenant's contribution and will be provided to the tenant as an attachment to the lease.

**B. Required Lease Clauses.** The following clauses will be required in leases used in



connection with FmHA-financed housing projects.

1. All lease agreements must include a statement indicating that the project is financed by the FmHA and is subject to the Title VI nondiscrimination provisions, and that all complaints are to be directed to the Secretary of Agriculture or to the Office of Equal Opportunity, USDA.

2. All lease agreements must also specify that should the tenant no longer meet the eligibility requirements of the project during the term of the lease agreement, he/she will be required to vacate the unit unless an exception is authorized by the State Director.

3. All leases used in FmHA-financed RRH projects must include the following clauses except for elderly, disabled, and handicapped persons in a full profit plan project:

a. "I understand that I will no longer be eligible for occupancy in this project if my income exceeds the maximum allowable adjusted income as defined periodically by the Farmers Home Administration for the (State/Territory)."

b. "I agree to immediately notify the lessor of any permanent change in the adjusted monthly income or change in the number of persons living in the household."

c. "I understand that I must promptly notify the lessor of any extended absences and that if I do not personally reside in the unit for a period exceeding 60 consecutive days, for reasons other than health or emergency, my net monthly tenant contribution shall be raised to \$\_\_\_\_\_/per month (market rent for Plan II projects or 125 percent of rent in Plan I projects) for the period of my absence exceeding 60 consecutive days. I also understand that should any rental assistance be suspended or reassigned to other eligible tenants, I am not assured that it will still be available to me upon my return. I also understand that if my absence continues, that as landlord you may take the appropriate steps to terminate my tenancy."

d. "I understand that should I receive rental benefits to which I am not entitled due to my failure to provide information or due to incorrect information provided by me or on my behalf by others, or for any other household member, I may be required to make restitution and I agree to pay any amount of benefits to which I was not entitled."

e. "I agree to promptly provide any certifications and income verifications required by the owner to permit determination of eligibility and, when applicable, the monthly tenant contribution to be charged."

4. Leases used by borrowers participating in the FmHA RA program will contain the following clauses. (These clauses can be made an addendum to the lease and they must be signed by the lessor and lessee):

"I understand and agree that as long as I receive rental assistance, my gross monthly tenant contribution (as determined on the latest Form FmHA 1944-8, which must be attached to this lease) for rent and utilities will be \$\_\_\_\_\_. If I pay any or all utilities directly (not including telephone or cable TV), a utility allowance of \$\_\_\_\_\_ will be deducted from my gross monthly tenant contribution and my resulting net monthly

contribution will be \$\_\_\_\_\_. If my net monthly tenant contribution would be less than zero, the lessor will pay me \$\_\_\_\_\_.

I also understand and agree that my monthly tenant contribution under this lease may be raised or lowered, based on changes in the household income, failure to submit information necessary to certify income, changes in the number and age of persons living in the household, and on the escalation clause in this lease. Should I no longer receive rental assistance as a result of these changes, or the rental assistance agreement executed by the owner and FmHA expires, I understand and agree that my monthly tenant contribution may be adjusted to no less than \$\_\_\_\_\_ (Basic Rental) nor more than \$\_\_\_\_\_ (Market Rental) during the remaining term of this lease, except that based on the escalation clause in this lease these rental rates may be changed by a Farmers Home Administration approved rent change."

[Note: Eligible borrowers with LH loans and grants, direct RRH loans, or insured RRH loans approved before August 1, 1968, may omit the words "no less than \$\_\_\_\_\_ (Basic Rental) nor more than" from the last sentence of the above statement.]

"I understand that every effort will be made to provide rental assistance so long as I remain eligible and the rental assistance agreement between the owner and FmHA remains in effect. However, should this assistance be terminated I may arrange to terminate this lease, giving proper notice as set forth elsewhere in this lease."

5. For leases with tenants occupying units in which borrowers are operating under Plan II Interest Credit Only:

"I understand and agree that my gross monthly tenant contribution as determined on the latest Form FmHA 1944-8, which must be attached to this lease, for rent and utilities will be \$\_\_\_\_\_.

If I pay any or all utilities directly (not including telephone or cable TV), a utility allowance of \$\_\_\_\_\_ will be deducted from my gross monthly tenant contribution except that I will pay not less than the basic rent nor more than the market rent stated below. My net monthly tenant contribution will be \$\_\_\_\_\_. I understand that should I receive rental subsidy benefits (interest credit) to which I am not entitled, I may be required to make restitution and I agree to pay any amount of benefit to which I was not entitled. I also understand and agree that my monthly tenant contribution under this lease may be raised or lowered based on changes in the household income, failure to submit information necessary to certify income, changes in the number and age of persons living in the household, and on the escalation clause in this lease. My tenant contribution will not, however, be less than \$\_\_\_\_\_ (Basic Rental) nor more than \$\_\_\_\_\_ (Market Rental) during the term of this lease, except that based on the escalation clause in this lease, these rental rates may be changed by a Farmers Home Administration approved rent change."

6. Leases used by borrowers with farm labor housing loans and/or grants will use the following additional clauses:

a. "I understand that the project is operated and maintained for the purpose of providing

housing for domestic farm laborers and their immediate families. I do hereby certify that a substantial portion of my immediate family income is and will be derived from farm labor. I further understand that domestic farm labor means persons who receive a substantial portion of their income as laborers on farms in the United States and either (1) are citizens of the United States, or (2) reside in the United States, Puerto Rico, or the Virgin Islands, after being legally admitted for permanent residence therein, and may include the immediate families of such persons. Laborers on farms may include laborers engaged in handling agricultural commodities while in the unprocessed stage, provided the place of employment, such as a packing shed, is on or near the farm where the commodity is produced. It also includes labor for the production of aquatic organisms under a controlled or selected environment."

b. "I agree that if my household income ceases to be substantially from farm labor for reasons other than disability or retirement, I will promptly vacate my dwelling after proper notification by the owner."

7. The lease agreement in congregate housing cases must include the following statement: "I understand that my ability to live independently in the project with the support services available will be evaluated on a periodic basis. I may be requested to vacate if a determination is made that I am no longer able to live in the project without additional assistance." This involves cases where the tenant has progressed or regressed to a state of health that requires, in the opinion of the management with competent medical advice, a level of care not available in the congregate housing facility.

C. Other Lease Provisions. All leases must contain provisions covering:

1. Names of the parties to the lease and all individuals to reside in the unit and the identification of the premises leased.

2. The amount and due date of monthly tenant contributions.

3. Any penalty for late payment of monthly tenant contribution according to paragraph IX B of this Exhibit.

4. The utilities and quantities thereof and the services and equipment to be furnished to the tenant by the management and the tenant's responsibility to pay utility charges promptly when due.

5. The process by which tenant contribution and eligibility for occupancy shall be determined and redetermined including:

a. The frequency of such tenant contribution and eligibility determinations.

b. The information which the tenant shall supply to permit such determinations: usually, income verification; names and ages of household members; and, in congregate facilities, information that permit management to determine the tenant's or co-tenant's level of function and degree of competence in performing daily living activities.

c. The standards by which rents, eligibility, and appropriate dwelling unit size shall be determined.



d. Tenant's household agreement to move to a unit of appropriate size if the household size changes.

e. The circumstances under which a tenant may request a redetermination of tenant contribution.

f. The effect of misrepresentation by the tenant of the facts upon which tenant contributions or eligibility determinations are based.

g. The time at which shelter cost changes, tenant contribution changes, or notice of ineligibility shall become effective.

6. The limitation upon the tenant of the right to the use and occupancy of the dwellings.

7. The responsibilities of the tenant in the maintenance of the dwelling and the obligation for intentional or negligent failure to do so.

8. Agreement of management to accept a tenant contribution without regard to any other charges owed by tenant to management and to seek separate legal remedy for the collection of any other charges which may accrue to management from tenant(s).

9. The responsibility of management to maintain the buildings and any common areas in a decent, safe, and sanitary condition in accordance with local housing codes and FmHA regulations, and its liabilities for failure to do so.

10. The responsibility of management to provide the tenant with a written statement of the condition of the dwelling unit (when the tenant initially enters into occupancy and when vacating the dwelling unit), and the conditions under which the tenant may participate in the inspection of the premises which is the basis for such statement.

11. The circumstances under which management may enter the premises during the tenant's possession thereof, including a periodic inspection of the dwelling unit as a part of a preventive maintenance program.

12. Responsibility of tenant to advise management of any planned absence for an extended period, usually 2 weeks or more.

13. Agreement that tenant may not let or sublet all or any part of the premises.

14. Understanding that should the project be sold to a buyer approved by FmHA, the lease will be transferred to the new owner.

15. The formalities that shall be observed by management and the tenant in giving notice one to the other as may be called for under the terms of the lease.

16. The circumstances under which management may terminate the lease, all limited to good cause, and the length of notice required for the tenant to exercise the right to terminate.

17. The procedure for handling tenant's abandoned property as provided by State law.

18. Disposition of lease if building becomes untenable because of fire or other disaster. Right of owner to repair or rehabilitate the building within a certain period or terminate the lease.

19. The agreement that any tenant grievance or appeal from management's decision shall be resolved in accordance with procedures consistent with FmHA regulations covering such procedures which are posted in the rental office.

20. The usual signature clause attesting that the lease has been executed by the parties.

D. *Prohibited Lease Clauses.* Lease clauses in the classifications listed below shall not be included in any lease.

1. *Confession of Judgment.* Prior consent by tenant to any lawsuit the landlord may bring against the tenant in connection with the lease and to a judgment in favor of the landlord.

2. *Distraint for Rental or Other Charges.* Authorization to the landlord to take property of the tenant and hold it as a pledge until the tenant performs any obligation which the landlord has determined the tenant has failed to perform.

3. *Exculpatory Clause.* Agreement by tenant not to hold the landlord or landlord's agents liable for any acts or omissions whether intentional or negligent on the part of the landlord or the landlord's authorized representative or agents.

4. *Waiver of Legal Notice by Tenant Prior to Actions for Eviction or Money Judgments.* Agreement by tenant that the landlord may institute suit without any notice to the tenant that the suit has been filed.

5. *Waiver of Legal Proceedings.* Authorization to the landlord to evict the tenant or hold or sell the tenant's possessions whenever the landlord determines that a breach or default has occurred.

6. *Waiver of Jury Trial.* Authorization to the landlord's lawyer to appear in court for the tenant and to waive the tenant's right to trial by jury.

7. *Waiver of Right To Appeal Judicial Error in Legal Proceedings.* Authorization to the landlord's lawyer to waive the tenant's right to appeal on the ground of judicial error in any suit or the tenant's right to file a suit in equity to prevent the execution of a judgment.

8. *Tenant Chargeable With Costs or Legal Actions Regardless of Outcome.* Agreement by the tenant to pay attorney's fees or other legal costs whenever the landlord decides to take action against the tenant even though the court finds in favor of the tenant.

(Omission of this clause does not mean that the tenant, as a party to a lawsuit, may not be obligated to pay attorney's fees or other costs if the tenant loses the suit.)

E. *Modification of Lease—Notification to Tenants.* The landlord may modify the terms and conditions of the lease, effective at the end of the initial term or a successive term, by serving an appropriate notice on the tenant, together with the tender of a revised lease or an addendum revising the existing lease. This notice and tender shall be delivered to the tenant either by first-class mail, properly stamped and addressed or hand delivered to the premises to an adult member of the household.

The date on which the notice shall be deemed to be received by the tenant shall be the date on which the first-class letter is mailed or the date on which the copy of the notice is delivered to the premises. The notice must be received at least 30 days prior to the last date on which the tenant has the right to terminate the tenancy without executing the revised lease. The notice must advise the tenants that they may appeal modifications to the lease in accordance with the FmHA tenant grievance and appeals procedure

(Subpart L of Part 144 of this chapter) if the modification will result in a denial, substantial reduction, or termination of benefits being received.

The same notification will be applicable to any changes in the rules and regulations for the project.

F. *Occupancy Rules.* Occupancy rules establish the basis for the management-tenant relationship. Occupancy rules and regulations must be provided and explained by the project management to enable the tenant to understand the purposes, objectives, and standards of the project. The rules will be approved by the FmHA State Director or designee, generally together with the project management plan, management agreement, and lease form.

1. All rules for occupancy and rent structures will be in writing posted conspicuously in the borrower's and/or manager's offices and provided to each tenant with the lease agreement.

2. Proposed changes of any rules for occupancy must be made available to each tenant at least 30 days in advance of implementation, and tenants must be advised that they may appeal changes in accordance with the FmHA tenant grievance and appeals procedure (Subpart L of Part 144 of this chapter).

3. No rule may infringe on the rights of the tenants to organize an association of tenants. Such associations may be organized to bargain with management, as well as to act socially and/or provide for the welfare of its members. The project management person or organization should be available and willing to work with a tenant organization.

4. Rules may be promulgated that prohibit activities which are detrimental to management and tenants. Such activities include threats to the health or safety of other tenants or the employees of the borrower, interference with the quiet enjoyment of the premises by other tenants, or damage to the physical structure of the project.

5. The borrower may choose to provide rules for *nonelderly* projects that either permit or exclude pets *except* that no rules may be promulgated that would prohibit the tenancy of a tenant household member who requires the services of a trained and certified seeing eye or hearing ear animal to achieve the normal function of that household member.

6. For each RRH project specifically built for the *elderly*, the borrower must establish project rules by October 1, 1987, permitting elderly, handicapped or disabled tenants to keep commonly accepted household pets. These pet rules are to be established according to the following:

a. Pet rules *must not*: (1) Prohibit, prevent, restrict or discriminate against any tenant who owns or keeps a pet in their apartment unit, with respect to continued occupancy in the project unless the approved project pet rules are violated.

(2) Prohibit, prevent, restrict or discriminate against any applicant who owns a pet with respect to obtaining occupancy to the project.

b. Borrowers with operational projects must consult with the tenants of the project



when establishing pet rules and document to the District Director how the consultation process was conducted.

c. Borrowers with new projects will establish pet rules prior to occupancy, but may revise those rules based on tenant comments and suggestions received after rent-up begins.

d. Pet rules will be approved by FmHA as part of, or an amendment to, the project lease. FmHA approval will be granted when the rules meet the provisions and intent of this subparagraph.

e. Pet rules will be reasonable and will be written to consider at least the following factors:

- (1) Density of project units.
- (2) Pet Size.
- (3) Type of pet.
- (4) Potential financial obligations of tenants who own or keep pets.
- (5) Standards of pet care.
- (6) Pet exercise areas.
- (7) State and local animal laws or ordinances.
- (8) Liability insurance.

f. Pet rules must allow the borrower or project manager authorization to remove from the project any pet whose conduct or condition is duly determined to constitute a nuisance or threat to the health or safety of other tenants in the project or persons in the surrounding community.

7. Initial rules will be attached to the lease agreement. Approval by FmHA for changes and additions may be requested annually with submission of annual reports or more frequently only in the case of an emergency situation.

8. The following items illustrate areas that should be addressed in rules developed by management and provided to all tenants prior to move-in:

- a. Explanation of rights and responsibilities under the lease. Where a non-English language is common to a project area, a lease written in that language should also be provided.
- b. Rent payment policies and procedures should be fully explained.
- c. Policy on periodic inspection of units.
- d. Responding to tenant complaints.
- e. Maintenance request procedure.
- f. Project services and facilities available to tenants.
- g. Office location, hours, and emergency telephone numbers.
- h. Map showing location of community facilities including schools, health care, libraries, parks, etc.
- i. Restrictions on storage and prohibition against abandoning vehicles in the project area.
- j. A project newsletter; if desired.
- k. Community and public transportation schedules.

9. Tenant may be permitted to have a guest(s) visit their household. However, an adult person(s) making reoccurring visits or one continuous visit of 14 days and nights in a 45-day period without consent of the management will be counted as a household member(s).

G. *Security Deposits.* 1. Security deposits are encouraged and they should be used when it is reasonable and customary for the

area. The amount of security deposits must be reflected in the borrower's management plan and may not be changed without the written consent of the FmHA District Director. When security deposits are used, they should be an amount equal to the tenant contribution for one month or basic rent, whichever is greater. Families receiving a HUD rental subsidy will pay security deposits according to HUD requirements. In an elderly project, the amount of additional security deposit for pets must be reasonable and not designed to prohibit or discourage tenancy but in no case should it exceed the basic rent of the project. Where a seeing eye or hearing ear animal is necessary for the normal function of a household member, an additional security deposit for the animal may not be charged.

2. Security deposits for persons eligible for RA or Section 8 assistance shall be administered in a manner to prevent hardship on the household. If such tenants cannot pay the full amount initially, they may be given terms that should ordinarily:

a. For RRH projects, not exceed a down payment of 25 percent of adjusted monthly income plus \$15 per month or that amount needed monthly to complete the security deposit within twelve months, whichever is greater.

b. For low-income farmworkers in an LH project, not exceed \$25 downpayment and \$15 per month until an equivalent of one month's project rent is reached. In the case of migrants who will occupy the units for a short period of time, exception to this policy by FmHA may be made upon written request from the borrower when it is shown that such deposits need to be raised to protect the security interest of the government and it will not create a hardship on the tenants.

3. Security deposits shall be handled in accordance with any State or local laws governing tenant security deposits. Tenant security deposits shall be deposited in a separate account at a Federally insured institution, and shall be handled in accordance with any State or local laws governing tenant security deposits. Funds in the Security Deposit Account shall only be used for authorized purposes as intended and represented by the project management in the management plan, and until so used, shall be held by the borrower in trust for the respective tenants.

4. Borrowers may assess fair and reasonable charges to the security deposit for damage and loss caused or allowed by the tenant. An itemized accounting for such charges must be presented to the tenant after the move-out inspection provided for in paragraph X E 2 of this Exhibit, unless the tenant has abandoned the property and his/her whereabouts are unknown and cannot be ascertained after reasonable inquiry.

H. *Special Lease Supplement.* Borrowers are encouraged to supplement lease agreements, particularly of elderly, disabled, and handicapped tenants, to:

1. Permit the borrower, with competent medical or clerical advice, to contact a predetermined sponsor(s) or guardian(s) to effect the transfer of the tenant to other appropriate housing when the tenant is (a) no longer able to functionally make self-

determinations or (b) to adequately provide self-care within the facilities and services provided by the project. A sponsor or guardian would be a person(s) designated by the tenant, generally a family member, friend, doctor, or member of the clergy.

2. Provide instruction to the borrower of a person(s) to contact in the event of death of the tenant.

When a lease has been supplemented, the borrower should also obtain an agreement from the designated sponsor(s) or guardian(s) to assume responsibility for the tenant in the event of need as identified in subparagraphs 1 and 2 above.

#### IX. Rent Collection

A pre-established day of the month should be the designated rental collection day. The time and place of onsite collection and/or the correct address for payment by mail should be well publicized and consideration should be given to an after-hours' depository if needed.

A. *Rental Receipts.* A form of serially-numbered rental receipts should be selected for use and the collection agent held accountable for every receipt. Optional collection services may be considered when they are available.

B. *Delinquent Rents.* A system to identify and detect unpaid rents should be instituted within the project. A penalty of up to \$10.00 for late payment of rent after a 10-day grace period, or the grace period prescribed by State law, may be permitted. The borrower should consider the circumstances causing the late payment before assessing any penalty. True hardship cases should not be assessed penalties; however, maintaining a firm and fair policy on rent collection encourages tenants to meet their rental obligations.

C. *Recapture of Improperly Advanced Rental Assistance and Interest Credit.* Recapture of improperly advanced RA and interest credit will be processed in accordance with 7 CFR Part 1951, Subpart N (FmHA Instruction 1951-N, available in any FmHA Office).

#### X. Maintenance

Maintenance is the process by which a project is kept up in all respects and includes land, buildings, and equipment. Maintenance responsibilities will be included in the management plan. Proper maintenance will help to keep a good image for the project, help to minimize vacancies, and help to preserve the project. Plans and policies for inspections, effective maintenance and repair are to be established at the outset and modified periodically as needed. The following types of maintenance are necessary:

A. *Routine Maintenance.* Routine or short-term type maintenance and repairs will be those cost items and services included in the annual budgets to be paid out of the operations and maintenance expense account. It includes regular maintenance tasks of the project that can be prescheduled or planned for, based on equipment availability and property characteristics. Also included are janitorial tasks performed on a regular basis to maintain the appearance



of the project and to prevent an accumulation of debris and subsequent deterioration.

**B. Responsive Maintenance.** This includes all maintenance tasks performed in response to either requests for service from tenants or unplanned breakdowns. An essential part of any maintenance system is to plan for requests coming from the dwelling units and for emergencies occurring in the systems serving the apartments. The project manager should develop a plan to focus on: who receives the requests, how they are handled, how specific employees are assigned to the tasks and what kind of records are kept. The capacity of the project manager to respond to requests and emergencies is one of the true tests of a successful maintenance program.

**C. Preventive Maintenance.** This is similar to inspection type maintenance. Regular checking and servicing of equipment and systems is done as required by service information. Preventive maintenance of mechanical systems, building exteriors, elevators, and heating systems in rental projects, require specially trained personnel. The project manager should establish biweekly or monthly schedules in which the routine oiling, adjusting, replacing of filters, and the like is done based on manufacturer's manuals and specifications.

**D. Long Term Maintenance.** These are major expense items which normally do not occur on an annual basis. The borrower may request permission to use reserve funds to pay for these expenses when they occur. However, use of funds out of the reserve account must be preapproved by FmHA.

**E. Inspection Maintenance.** These are maintenance inspections performed periodically to discover problems before crisis situations develop. The following inspections of each tenant's apartment should be made at appropriate times:

**1. Move-in Inspection.** Before move-in occurs, the management and the applicant accepted for tenancy should together inspect the unit to be occupied and agree upon any repairs needed. A written inspection report shall be prepared and a copy retained in the tenant's file. Any of the identified deficiencies not corrected prior to occupancy should be noted on the lease or inspection move-in report and signed by the tenant and borrower's representative.

**2. Move-out Inspection.** An inspection should be scheduled with the tenant when the management becomes aware that the tenant is moving out or has vacated the unit. Whenever possible, the inspection should be performed after the furniture has been moved out and before any portion of the security deposit is returned to the tenant. Any repairs or costs to be charged to the tenant will be according to the terms of the lease, local law, and regulations governing security deposits in paragraph VII G of this Exhibit.

**3. Periodic Inspection.** An inspection of this type should be made at least annually. The borrower should make provisions in the lease for periodic inspection of the units as a part of a preventive maintenance program.

#### XI. Rent Changes

It may be necessary as operating costs and/or revenues fluctuate to consider a change of rental rates to keep the project

visible. Before any change of rental rates may occur, *prior written consent of FmHA is required.* The procedure to request and implement a rent change is specifically covered in Exhibit C of this subpart.

#### XII. Borrower Project Budgets

**A. Budget Development and Preparation.** 1. Borrowers are required to develop an annual budget of project income and expense.

2. Separate budgets will be developed for each project when the borrower owns more than one MFH project.

3. Budgets will cover a 12 month period selected by the borrower to be the project fiscal year of operation.

4. Budgets will be prepared according to the instructions contained in Form FmHA 1930-7, "Statement of Budget and Cash Flow."

**B. Return on Investment as Authorized by Borrower's Loan Agreement/Resolution.** 1. Limited profit borrowers may take the return authorized for the current budget year without further FmHA approval under the following conditions:

a. Payment may be made only once a year at the end of the project fiscal year.

b. Payment must have been approved as part of the borrower's annual budget on Form FmHA 1930-7.

c. The project must have produced adequate income during that year to cover all expenditures in accordance with the approved budget.

d. The balance in the reserve account must be current less any authorized withdrawals.

e. Payment of the return may not produce a year end deficit.

2. If income is not adequate in any given fiscal year to cover payment of the return to owner, FmHA may authorize the return to be paid from:

a. Excess funds available at the end of the following fiscal year of operation provided it does not result in a rent increase and the reserve account is current less authorized withdrawals. (Non-cash losses of the borrower entity do not qualify to be recouped in following years.) This option is authorized only for the year immediately following the year in which the return was not paid.

b. Release of reserve funds with District Director approval, provided:

(1) The Reserve Account will not be reduced below the amount required to be accumulated by that time considering adjustments for any previously authorized withdrawals; and,

(2) During the next 12 months the amount in the Reserve Account will not likely fall below that required to be accumulated by the end of such 12-month period.

**C. Advancement (Loan) of Funds to a Project by the Owner, Member of the Organization, or Agent of the Owner.** 1. Such advances are discouraged but may be allowed when justified, provided the prior written approval of the District Director has been obtained. Justification will be based on the following:

a. A review of the documented circumstances and the project operating budget before any funds are advanced (loaned).

b. Funds are not immediately available from any of the following sources:

- (1) Reserve funds
- (2) Initial operating capital
- (3) An imminent rent increase
2. The funds will be applied to ordinary project operating and maintenance expenses.
3. No interest will be charged or paid on the loan from project income.
4. No lien in connection with the loan will be filed against the property securing the FmHA loan or against project income.
5. The pay-back of the advance (loan) may be permitted by the District Director provided the terms and conditions were mutually agreed to by the borrower and FmHA at the time of the advance and the financial position of the project will not be jeopardized. Payback should only be permitted on the advance when the FmHA debt is current and the reserve requirements are being maintained at the required levels.

#### XIII. Accounting and Reporting Requirements and Financial Management Analysis

**A. General.** RRH, RCH, and LH borrowers are expected to account for all project income and expenses through a bookkeeping or accounting system appropriately reflecting the complexity of project operations. The degree of sophistication will also reflect such factors as the type of borrower, the size, location and type of project and the type of financial management information needed to provide adequate guidance and supervision to assure program objectives are being met.

1. Borrowers with loan agreements or resolutions are subject to the following conditions:

a. All RRH and LH projects with loan agreements or resolutions approved on or after October 27, 1980, are required to comply with the provisions of this paragraph XIII.

b. All RRH and LH projects with loan agreements or resolutions approved prior to October 27, 1980, will be guided by the recordkeeping and reporting requirements of their respective loan agreement or resolution.

(1) They are encouraged, however, to adopt the provisions of this section by amending their existing loan agreement or resolution.

(2) The State Director may require adoption of these provisions when deemed necessary as a loan servicing action.

c. Any amendment to an existing loan agreement, or resolution, requires concurrence of all parties and written approval by the State Director with advice from the OGC prior to enactment of the amendment.

d. Individual farm borrowers with LH units will be considered in general compliance with this paragraph by virtue of completing the recordkeeping and reporting requirements of their farm and home planning with FmHA.

2. Borrowers without loan agreements or resolutions are required to maintain information in sufficient detail to provide the necessary assurance that program objectives are being met. As necessary to protect the integrity of the program, the State Director may require the borrower to establish a system capable of accounting for project operations and reporting.

**B. Accounting System.** A bookkeeping and accounting system provides the financial information needed to effectively plan,



control and evaluate project activity. The type of system should be determined prior to loan closing, but it may be revised with FmHA approval to meet program objectives. FmHA may also prescribe the system to be used. Form FmHA 1930-5, "Bookkeeping System—Small Borrower," can be adapted to the bookkeeping needs of small RRH projects. Bookkeeping for MFH projects may be maintained using a cash, modified cash, or accrual type accounting system.

1. *Type of accounts.* As used in this paragraph, the term account is used interchangeably to mean either a ledger (or bookkeeping account) or an actual banking account. Depending upon the complexity of the accounting system being used, these accounts may be further subdivided into subsidiary ledgers or accounts to assist the borrower in providing the information needed for project financial analysis or reporting requirements. Regardless of the number or types of accounts established, all bookkeeping and accounting systems must meet the following:

a. All project funds shall be held only in accounts insured by an agency of the Federal Government, unless otherwise specifically authorized by the borrower's loan agreement, loan resolution and this paragraph.

b. All funds in any account shall be used only for authorized purposes as described in their loan agreement or resolution and this paragraph.

c. All funds received and held in any account, except the tenant security deposit shall be held in trust by the borrower for the loan obligation until used.

d. All project funds will be maintained separately and distinct from any other project or enterprise of the borrower and/or his/her management agent. Under no circumstances will project funds be commingled with those of another project.

e. Each project will maintain at least one demand deposit or checking account. However, it is not necessary for each bookkeeping account within one project to be maintained as a checking account.

2. *Required Accounts.* All RRH, RCH, and LH borrowers will maintain, as a minimum, the accounts required by their loan agreement or resolution. The following accounts are required for all RRH and RCH loans approved after October 27, 1980, or those who have amended their loan agreements or resolutions to adopt these accounts.

a. *General Operating Account.* This account records all project income and disbursements. Excess project cash held in this account may be combined with other project funds described in this paragraph in temporary (immediate call) interest bearing accounts when separate bookkeeping records are maintained for the individual project accounts. This account may be further subdivided as follows:

(1) *Initial Operating Capital.* The borrower will have deposited the required initial operating capital into this temporary bookkeeping account by the time of the FmHA loan closing or when interim financing funds are obtained, whichever occurs first. The initial operating capital will be deposited in the General Operating Account. After two,

but before five full budget years of project operation, the State Director may authorize the borrower to make a onetime withdrawal from project funds, an amount not to exceed the borrower's beginning cash contribution to the Initial Operating Capital as described in the loan agreement or resolution, provided that:

(i) The loan was closed on or after October 27, 1980,

(ii) The loan agreement or resolution signed by the borrower is Form FmHA 1944-33 "Loan Agreement," 1944-34 "Loan Agreement," or 1944-35 "Loan Resolution,"

(iii) The project has achieved at least a 95% occupancy level at time of the withdrawal request,

(iv) The withdrawal will not affect the financial integrity of the project. The borrower must demonstrate that all prudent maintenance is being planned and performed, and payment of necessary project expenses are not being deferred,

(v) The State Director determines that the withdrawal will not necessitate a rent increase during the year of withdrawal or during the next year of operation, except that rent increases needed because of normal increased budget expenses unrelated to the withdrawal may be approved.

(vi) The State Director has reviewed and approved any required borrower reports before the Initial Operating Capital is withdrawn.

(2) *Deposits.* All income and revenue from the housing project shall, upon receipt, be immediately deposited in the General Operating Account. This will include rent receipts, housing subsidy payments (including HUD Section 8 and FmHA RA payments), laundry revenue, or any other project income. The borrower may also deposit other funds at any time which are to be used for purposes authorized by this section including transfers from the Reserve Account.

(3) *Disbursements.* Not later than the 15th of each month, out of the General Operating Account, the borrower shall pay or fund the actual, reasonable and necessary monthly project expenses. Current expenses may include the initial purchase and installation of furnishings and equipment with any other funds deposited in the General Operating Account which are not proceeds of the loan or income or revenue from the project. (However, non-profit borrowers are permitted to use loan funds specified for initial operating capital purposes as authorized in FmHA Instruction 1944-E.) Other authorized disbursements are FmHA approved installments of debt service, real estate tax and insurance escrow, reserve, and return on investment as provided in Section 2c below. Any balance remaining in the General Operating Account except as authorized above, may be retained in this account or transferred to the Reserve Account.

(4) *Unauthorized Disbursements.* Late fees charged the borrower according to Subpart K of Part 1951 of this chapter, may not be paid from project income. When late fees are deducted by FmHA from payments made from project income, the project General Operating Account must be reimbursed from

nonproject income of the owner or management agent or deducted from the owner's return on investment.

b. *Real Estate Tax and Insurance Escrow Account.* Funds recorded in this account may be deposited in an interest bearing project account. Each month after the payment of actual, reasonable, and necessary current operating and maintenance expenses there shall be transferred from the General Operating Account to the Real Estate Tax and Insurance Escrow Account an amount equal to one-twelfth of the total anticipated real estate tax and insurance payments for the year. Any interest earned shall be prorated based on the amount held in the escrow account at the time the interest is earned and shall accrue and be part of the account.

c. *Reserve Account.* Funds recorded in this account should be held in an interest bearing project account.

(1) Immediately after paying each installment for the orderly retirement of the FmHA loan, as provided in the borrower's promissory note, required reserve installments shall be transferred to the Reserve Account at the monthly rate stipulated by the borrower's loan agreement or resolution. Monthly transfers will continue until the account reaches the total amount specified in the loan agreement or resolution. Monthly transfers shall be resumed the next month following disbursement from the Reserve Account until it is restored to the specified total minimum sum.

(2) Reserve Account funds not immediately needed for authorized purposes may be invested in saving certificates insured by a Federal institution, or invested in readily marketable obligations of the United States Treasury Department, the earnings on which shall accrue to the reserve account.

(3) Interest earnings may be used to meet the monthly installments to the Reserve Account and/or to meet a modified and higher reserve level established periodically by an FmHA approved amendment to the borrower's loan agreement or resolution. Such amendment may be made to build reserve for scheduled replacement of depreciable property items in addition to general reserve requirements.

(4) Any amount in the reserve account which exceeds the total sum specified in the loan agreement or resolution may be transferred to the General Operating Account for the authorized purposes only when it is agreed between the borrower and the FmHA to be in excess of the requirement. However, the FmHA District Director may direct the excess sum to be retained in the Reserve Account when determined necessary to protect the Government's security interest.

(5) With prior written consent of the District Director, funds in the Reserve Account may be used by the borrower or its designee for the following purposes:

(i) To meet payments due on the loan obligations in the event the amount for debt service is not sufficient for that purpose.

(ii) To pay costs of repairs or replacements to the housing, furnishings or equipment caused by catastrophe or long-range depreciation which are not current expenses.



Withdrawal for authorized purposes should be approved in advance during the annual budget approval process.

(iii) To make improvements to the housing project without creating new living units.

(iv) For other purposes desired by the borrower, which in the judgment of the Government will promote the loan purposes, strengthen the security, or facilitate, improve, or maintain the orderly collectibility of the loan without jeopardizing the loan or impairing the adequacy of the security.

(v) To pay a return on investment at the end of the borrower's project operating year, provided that after such disbursements the amount in the Reserve Account will not be less than that required by the loan agreement or resolution to be accumulated by that time and the amount in the Reserve Account will likely not fall below that required to be accumulated during the next 12 months.

(A) In the case of borrowers operating on a limited profit basis, to pay a return on the borrower's initial investment as identified in the loan agreement or resolution.

(B) In the case of borrowers operating on a full profit basis, to pay an annual return as specified in the borrower's loan agreement or resolution.

d. *Tenant Security Deposit Account (when applicable).* Upon receipt, all tenant security deposit funds collected shall be recorded in a bookkeeping account that is kept separate from the project bookkeeping accounts. These funds shall be deposited in an account that is kept separate from any project funds and will be handled according to any State or local laws governing tenant security deposits. Funds in the Tenant Security Deposit Account shall be used only for authorized purposes as intended and represented by the project management plan. They shall be held by the borrower in trust for the respective tenants until so used. Any amount of the Tenant Security Deposit Account which is retained by the borrower as a result of lease violations shall be transferred to the General Operating Account and treated as income of the housing.

(1) The owner will follow all State and local requirements governing the handling and disposition of tenant security deposits.

(2) In no case, will interest earned on security deposits accrue to project management or the owner. Any interest earned but not returned to the tenants will accrue to the project's general operating account for disposition as outlined in the management plan.

c. *Borrower Reporting Requirements.* Certain reports are necessary to verify compliance with FmHA requirements and to aid the borrower in carrying out the objectives of the loan. Some reports must be submitted with the FmHA payments and others submitted to FmHA either monthly or annually. Exhibits B-6, B-7, and B-8 of this Exhibit (Management Handbook), are to be used as a guide for determining when reports are due and the number of copies required. (Also see § 1930.124 of this subpart.) The following reports will be prepared and submitted by the borrower:

1. *Monthly Reports:* a. Submit Form FmHA 1930-6, by the tenth of each month to the District Office to reflect the project

operations for the preceding month. Monthly reports will generally be completed on a cash basis, but may also be completed on a modified cash or accrual basis with appropriate modifications made on the form.

b. Submit Form FmHA 1944-29, with the payment to the District Office. This form must be submitted each month to report coverage and/or request RA, even if a loan payment is not submitted. This form reflects occupancy in the project as of the first day of each month.

c. For LH projects, Form FmHA 1944-29 will be submitted monthly for the LH tenants who receive RA. Otherwise, the Form FmHA 1944-29 covering all LH tenants will be submitted to FmHA at least once annually with the annual reports.

2. *Annual Reports:* Annual reports may be completed on a cash, modified cash, or an accrual basis. Within 60 days following the close of the borrower's fiscal year, the borrower will submit the following reports to the FmHA District Office:

a. Form FmHA 1930-7, showing all planned project income and expenses for the next year as well as actual project income and expense for the past year.

b. Form FmHA 1930-8, "Year End Report and Analysis For Fiscal Year Ending

c. Audit report or verification. All audit reports will be completed in accordance with Departmental regulations, Subpart I of Part 3015 of Chapter XXX of Title 7, implementing the single audit provisions contained in OMB Circular A-128, when applicable or according to the booklet, "Instructions to Independent Certified Public Accountants and Licensed Public Accountants Performing Audits for FmHA Borrowers and Grantees." For projects with 25 or more units the audit will be prepared by a CPA licensed on or before December 31, 1979, or a CPA. Borrowers with 24 units or less will need to provide a verification by an individual who is qualified by education and/or experience and who is independent of the borrower or by a committee of the membership not including any officer, director, or employee of the borrower; however, the State Director may also require audits by a CPA or CPA for any project.

d. Copy of the minutes of the annual meeting, when applicable.

e. Energy audit for review according to the provisions of Exhibit D of this subpart.

f. Any other related material that may be requested by the District Director.

D. *Financial and Management Analysis.* Financial and management analysis provides information on the status of the project's operation. Regular analysis can help identify strengths and weaknesses so that appropriate corrective actions can be taken. Some methods of analysis are:

1. *Budget Analysis:* Using monthly and annual reports, the borrower or project manager compares actual income and expenses with the budgeted amounts. Any differences between the budget and actual figures indicate areas of the project operation where the manager may need to focus added attention and/or take corrective action.

2. *Ratio Analysis:* Ratios are an effective tool for financial analysis. They prescribe

various measures of actual operating performance. FmHA and borrowers should develop a data base of recorded ratios for comparative analysis. Some useful ratios are:

a. Vacancy Rate	=	Total vacancy days for the month Total unit days for the month
b. Resident Turnover Ratio	=	Total units becoming vacant during the period Average units occupied for the period
c. Expense Ratio	=	Total Expense Total Income
d. Cost Per Unit	=	Total Expense (By category) Total No. of Units
e. Working Capital Ratio	=	Current Assets Current Liabilities
f. Collection Ratio	=	Total Collections Total Rent Roll
g. Percent of revenue from Government Sources	=	FmHA Rental Assistance or HUD Section 8 Payments Total Market Rent

#### XIV. Termination of Tenancy and Eviction

Borrowers and project managers should actively develop ways and means to avoid forced terminations of lease and the eviction of tenants by considering the following:

A. *Tenant's Entitlement to Continued Occupancy.*—1. *General.* The borrower or project manager may terminate or refuse to renew any tenancy only for material noncompliance with the lease or other good cause such as:

- Noneligibility for tenancy.
- Action or conduct of the tenant which disrupts the liveability of the project by adversely affecting the health or safety of any tenant, or the right of any tenant to the quiet enjoyment of the leased premises and related project facilities, or that has an adverse financial effect on the project.
- Expiration of the lease period is not sufficient grounds for eviction of a tenant.



2. **Material Noncompliance.** Material noncompliance with the lease includes:

a. One or more substantial violations of the lease; or

b. Repeated nonpayment of rent or any other financial obligation due under the lease (including any portion thereof) beyond any grace period constitutes a substantial violation; or

c. Repeated minor violations of the lease which disrupt the liveability and harmony of the project by adversely affecting the health or safety of any person, or the right of any tenant to the quiet enjoyment of the leased premises and the related project, or that have an adverse financial effect on the project.

3. **Other Good Cause.** Conduct cannot be considered as other good cause unless the borrower or project manager has given the tenant prior notice that the conduct will constitute a basis for termination of tenancy.

4. **Rent Overburden.** Any tenant household (except those receiving Section 8 benefits) paying more than the contribution levels cited in paragraphs IV A c (1) or (2) or (3) of this Exhibit toward rent, including utilities, is considered to be experiencing rent overburden. Whenever a tenant is experiencing rent overburden, borrowers are encouraged to utilize any available and compatible governmental rental subsidies including FmHA RA and/or interest credit; or to assist tenants in applying for Section 8 housing assistance to minimize termination of tenancy.

B. **Notice of Termination.** Any notice to terminate tenancy must be based on material violation of the lease terms or for other good cause as determined by the borrower or the project manager.

1. The notice of intent to terminate the tenancy will be handled according to the terms of the lease. Tenants will be given prior notice of eviction according to State or local law. The notice must:

a. Refer to relevant provisions in the lease.

b. State the reasons for the termination with enough specificity to enable the tenant to prepare a response. In those cases where the proposed termination of the tenancy is due to the tenant's failure to pay rent, a notice stating the dollar amount of the balance due on the rent account and the date of such computation shall satisfy the requirement of specificity.

c. State that the tenancy is terminated on a date specified.

d. Advise the tenant that if he or she remains in the leased unit on the date specified for termination, the borrower may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense.

2. The notice shall be accomplished by: (a) sending a letter by first class mail, properly stamped and addressed, to the tenant at his or her address at the project, with a proper return address; and (b) serving a copy of the notice on any adult person answering the door at the leased dwelling unit, or if no adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be deemed effective until both notices provided for herein have been accomplished. The date on which the notice shall be deemed

to be received by the tenant shall be the date on which the first class letter provided for in this paragraph is mailed, or the date on which the notice provided for in this paragraph is properly given, whichever is later.

3. A copy of any notice of eviction will be forwarded to the FmHA District Office. The District Director will review the notice for compliance with this paragraph XIV and any State Supplements that have been issued covering tenant evictions with respect to the proper preparation and handling of the notice. If the notice is found to be properly prepared, no further action is needed. If the notice is found to be improperly prepared, the District Director will notify the borrower to cease the action and will then inform the borrower how the notice is improperly prepared. The District Director will not indicate any opinion on the merits of the eviction to the borrower or project manager at this time.

#### XV. Security Servicing

Security servicing, as referenced in this Exhibit, concerns the borrower's general responsibilities in relation to the loan agreement or resolution, mortgage, and other loan documents. It does not deal with security items between the borrower and the tenants. FmHA will look to the borrower to fulfill its obligation according to the requirements of the loan agreement or resolution, note, mortgage, and other legal or closing documents. Some items of special emphasis are:

A. **Fidelity Bond.** All projects will be required to obtain Fidelity bond coverage for the borrower officials and all employees entrusted with the receipt, custody, and disbursement of any project funds or negotiable or readily saleable personal property. Fidelity bond coverage should be obtained as soon as there are assets within the organization and must be obtained before any loan funds or interim financing funds are made available to the borrower. Fidelity bonds will be obtained according to the following guidelines:

1. Individual or organizational borrowers will provide a fidelity bond when they have employees with access to project assets as cited in paragraph XV A, other than when a management firm has exclusive access to such assets.

2. Borrowers who use a management firm/individual with exclusive access to project assets as cited in Paragraph XV A will require the firm/individual to provide a fidelity bond. In addition, if the borrower takes possession of or gains access to the cited project assets, the borrower must be covered as stated in paragraph XV A(1).

3. Fidelity bond coverage is not required when a loan is made to an individual (natural person) and that individual will be responsible for such activities.

4. In the case of a Land Trust where the beneficiary is responsible for management, the beneficiary will be treated as an individual.

5. A General partnership will not be required to provide fidelity bond coverage where the partners are responsible for the receipt, custody and disbursement of its funds or any other negotiable or readily saleable personal property.

6. The amount of the bond will at least equal the potential gross project income for two months rental collection or the maximum amount of money the project is expected to have on hand at any one time, including cash on hand, money in reserve and other special accounts, etc., whichever is greater.

7. The United States acting through the FmHA will be named as co-obligee in the bond when not prohibited by State Law.

8. Form FmHA 440-24, "Position Fidelity Schedule Bond," may be used when commercial insurance or bonding forms are not acceptable to the State Director provided Form FmHA 440-24 is permitted by State Law. In those cases where commercial insurance or bonding forms are used, the form of bond must be approved by the State Director. Use of commercial insurance or bonding forms are encouraged.

9. A blanket bond may be accepted from a borrower or management agent when blanket coverage is more advantageous cost-wise for each project on a pro-rata basis, the coverage limit for each project is identified or the total coverage limit is at least equal to the sum of all projects and coverage is restricted exclusively to FmHA-financed MFH projects.

10. The borrower's fidelity bond premiums may be a project expense when coverage is obtained and paid by the borrower.

11. Fidelity bond premiums for a management agent(s) will be included in the management fee.

12. A fidelity bond may have a deductible figure in an amount equivalent to 2 percent of the initial project contribution for operating capital but not in excess of \$2,000.

B. **Insurance.** The minimum amounts and types of insurance required of the borrower will be determined by FmHA in accordance with Subpart A of Part 1806 (FmHA Instruction 426.1) and Subpart B of Part 1806 (FmHA Instruction 426.2). All references to County Supervisor shall be construed to mean District Director when applied to the multiple housing program. The borrower or its agent shall obtain:

1. Adequate fire, extended coverage, and earthquake insurance as needed will be required on all buildings included as security for the loan or grant. The amount of coverage will be not less than the amount specified on Form FmHA 426-1, "Valuation of Buildings."

2. Suitable Worker's Compensation Insurance on all its employees. (Worker's Compensation Insurance for employees of a management agent shall be paid out of the agent's management fee.)

3. Adequate liability insurance.

4. Flood insurance when the project is located in a designated flood hazard area.

C. **Real Estate and Personal Property Taxes.** All borrowers will be required to pay their taxes before they become delinquent and provide FmHA with proof of payment. An exception to the above may be made if the borrower has formally contested the amount of the property assessment and has escrowed the amount of taxes in question in a manner acceptable to the District Director.

30-31. Exhibit B-1 to Subpart C is amended by revising paragraph 4.d. and



revising the title to paragraph 11 to read as follows:

**Exhibit B-1 of Subpart C—Management Plan Requirements for FmHA Multiple Family Housing Projects**

4. \*\*\*  
d. Is the responsible person aware of FmHA guidelines covering family size and needs as they relate to unit size?

11. *Plans for tenant participation in project operations and tenant's relationship with management.*

32. Exhibit B-3 to Subpart C is amended by changing the reference in paragraph IV.E. from "Form FmHA 444-8" to "Form FmHA 1944-8" and in the first sentences of paragraph V.B. and paragraph V.C. by removing the words "a separate" and inserting in their place the word "an."

33. Exhibit B-9 to Subpart C is amended in the heading information by inserting a line between the lines "Employee" and "Address" to read "SSN (optional) \_\_\_\_\_."

34. Exhibit C to Subpart C is revised to read as follows:

**Exhibit C of Subpart C—Rent Changes**

*I. Objectives*

This Exhibit prescribes the method of processing changes in the monthly rental rates for tenants in Farmers Home Administration (FmHA) Rural Rental Housing (RRH) and Labor Housing (LH) projects. This Exhibit covers all RRH and LH loans, including those approved before the date of this subpart.

*II. Definitions*

A. Approving Official. State Director or designated State and District Office staff with delegated authority according to § 1930.143 of this subpart.

B. Utility. Sewer, water, trash collection, electricity, natural gas, and any other fuel used specifically for cooking, heating, and/or cooling.

*III. Initial Understanding With Borrower*

A. All RRH and LH applicants will be informed at the application stage of the agency's rent change procedure. All borrowers will be advised that all proposed rent changes must comply with this Exhibit. This Exhibit will also apply to rent changes resulting from Housing and Urban Development's (HUD) Automatic Annual Adjustment Factors for units receiving Section 8, assistance.

1. Projects approved prior to November 30, 1983, may submit a rent change request based on a realistic projected budget for the interim year or the ensuing full year.

2. Projects approved on or after November 30, 1983, may submit a rent change request

only after cost(s) incurred demonstrate a need.

B. Rental rates in projects financed in whole or in part by an RRH or LH loan may not be raised without FmHA written consent according to requirements in loan agreements, loan resolutions, and other instruments executed in connection with RRH and LH loans. Changes requiring only prior FmHA review are those which are beyond the borrowers' control to cover changes in taxes or utilities, and rent changes which do not result in an increase in the tenants' total shelter cost. Borrowers are encouraged to have the effective date of needed rent changes coincide with the start of their fiscal year or with the start of the season in the case of LH projects occupied on a seasonal basis. Rental change requests normally should be made at least 60 days prior to the end of the borrower's fiscal year. It is anticipated that rent changes would not be necessary more than once a year.

C. All borrowers are encouraged to participate in the FmHA Rental Assistance (RA) Program. However, unless the Administrator notifies State and District Offices otherwise, all borrowers with projects meeting the eligibility requirements of Paragraph II B of Exhibit E of this subpart, except full profit borrowers, will be required according to Section 530 of Title V of the Housing Act of 1949, as amended, to apply for and accept RA when it appears that a rent change will cause more than 20 percent of the low-income tenants to pay in excess of 30 percent of adjusted monthly income for costs of rent and utilities. If FmHA does not have RA available for this purpose, the borrower is encouraged to use other sources of governmental rent subsidies. The availability or unavailability of governmental rent subsidies will not preclude FmHA from processing a rent change request.

D. Even though RA is not available, borrowers are encouraged to convert to Interest Credit Plan II to give tenants the most favorable rents possible.

*IV. Borrower's Responsibility in Processing Rent Changes Which Increase Housing Costs to Tenants and Require FmHA Prior Approval*

A. When an RRH borrower, or LH borrower, determines that a rental change is needed for reasons other than those specified in paragraph VI., the borrower must meet with the District Director to review the following information before the "Notice of Proposed Rent Change" is posted and delivered to the tenants. In lieu of meeting with the borrower, the District Director may allow the information to be submitted to the District Director for prior review before being posted. The borrower may proceed to post the notice 15 days after the submission or upon receipt of the District Office's response whichever is earlier.

1. Facts demonstrating the need and justification for a rent change in accordance with paragraphs III A 1 or 2 of this Exhibit.

2. A new operating budget for borrower fiscal year showing:

- Currently approved budget at old rents.
- Actual income and expenses to date.
- Proposed budget at proposed new basic rents.

d. Proposed budget at proposed new market rents (when applicable).

3. An application for RA on Form FmHA 1944-25, "Request For Rental Assistance," if the borrower's project is an eligible project and the proposed rent change will cause 20 percent of the very low- and low-income tenants to pay in excess of 30 percent of adjusted monthly income for the costs of rent and utilities. If the low-income tenants are receiving some other form of rent subsidy, such as HUD's existing Section 8, an exception may be made to this requirement.

4. A new energy audit or a listing of deferred improvements identified in a previous energy audit that was performed within the past five-year period according to the requirements of Exhibit D of this subpart or regulations then extant.

5. Any other information the borrower believes necessary to justify the proposed rent change.

B. Current tenant certifications on Form FmHA 444-8 "Tenant Certification," or other form approved by FmHA must be on file in the District Office.

C. After the borrower and District Director have reviewed the rent change application, the borrower will notify all affected tenants of any proposed rent change using the format of Exhibit C-1 of this Exhibit. The "Notice to Tenants of Proposed Rent Change" will advise tenants that during a 20-day comment period identified in the posted Notice, they have an opportunity to inspect, copy, and make written comments or objections to all materials which will be made available to them justifying the proposed rental increase. Tenants will be advised that they may also review any subsequent material submitted by the borrower to FmHA to support the rent change. If subsequent material is submitted, the borrower will be required to post a new notice. The Notice will advise the tenants that all written comments or objections should be submitted directly to the FmHA District Director by the end of the 20 day comment period. Tenants must be notified by the following methods:

1. The owner or management agent must mail or hand deliver copies of the Notice to all affected tenants and the District Director at least 60 days prior to the anticipated effective date of the rent change. By the end of the 20-day comment period, which is included within the 60-day period, the borrower may submit to the District Director any other information to be considered.

2. The management must also post prominently in common areas around the project (laundry rooms, parking areas, recreation rooms, etc.) copies of the Notice. In addition to plain English, all notices will be published in the other primary languages of the tenants.

D. Notification to the tenant of proposed rent change will not be required when an change in the utility allowance only is proposed on Exhibit A-5 of Subpart E of Part 1944 of this chapter, and the utilities are paid directly by the tenants. This does not preclude posting of the FmHA Letter of Approval as provided for in paragraph V B 1 of this Exhibit.



### V. Determination by FmHA

A. *Actions by District Director.* The District Director will not consider a rent change application complete and acceptable until the borrower has complied with all terms listed in paragraph IV of this Exhibit. When the application and all attachments for the proposed rent change have been received (including the tenant comments when notification is required), the District Director will:

1. Review all the material submitted.
2. Provide a copy of the borrower's latest Form FmHA 1944-29, "Project Worksheet for Interest Credit and Rental Assistance."
3. Determine if RA is available for an eligible project on behalf of the low-income tenants.
4. When the change is requested for energy savings improvements identified in an Energy Audit, the District Director shall determine the cost effectiveness and financial impact of the proposed improvements from information contained in the energy audit. The District Director's determination will be made according to paragraph VI of Exhibit D of this subpart.
5. When State Office approval is required, the District Office will submit to the State Director:
  - a. Appropriate recommendations on the request,
  - b. An indication of the number of tenants who will need RA as a result of the rent changes,
  - c. All the material received from the borrower, including tenant comments or objections, at the end of the 20-day comment period.
  - d. A short narrative describing the general tone of tenant comments and concerns.
6. When a member of the District Office staff is the approval official, the documentation required by V.A.5. above, will be attached to the rent change request.
7. When the borrower has requested RA, complete Form FmHA 1944-25 and forward it to the State Director.

B. *Actions by the Approval Official.* When the application, attachments and comments are received, the approval official will review the material to determine if the rent change is justified. The borrower will be notified by the approval official of the determination within 45 days from the date the "Notice to Tenants of Proposed Rent Change" is posted.

1. *Approval Actions.* a. When a rent change is approved, the approval official will notify the borrower by using Exhibit C-2 of this subpart. The Notice letter will be prepared using the required and/or optional paragraphs as applicable. The reasons for the approved rent change should be concise. The Notice Letter will be mailed or hand delivered to each tenant and posted in a conspicuous place(s).

b. When the borrower's project is operated on a profit basis as defined in § 1944.205(s) of Subpart E to Part 1944, and the purpose of the rent change is for: justified operating and maintenance expense; funding the reserve account; other project expenses; providing or maintaining a profit, the change may be allowed as long as eligible tenants can afford the new rental rate.

2. *Disapproval Actions.* When the approval official determines an application for a

proposed rent change is not justified on the basis of the information submitted, the approval official will notify the borrower in writing of the reason(s) why the rent change is not approved. The borrower will be advised of the right to file an appeal regarding the rent change disapproval according to § 1906.56 of Subpart B of Part 1900 of this chapter. Rent changes may not be approved when any of the following circumstances exist:

- a. The borrower is able but unwilling to comply with applicable tenant eligibility requirements; the audit and reporting requirements of this subpart; or, the conditions set forth in the borrower's loan agreement or resolution, interest credit and/or rental assistance agreement, promissory note, or mortgage.
- b. The budget for the project reflects sufficient income at the present rent structure to meet operation and maintenance expenses which are appropriate and reasonable in amount, meet the FmHA debt service requirements, meet the required reserve account deposit, and provide a return to the borrower, when appropriate.
- c. The borrower's project is operated on a profit basis as defined in § 1944.205(s) of Subpart E to Part 1944 and the proposed rent change is for purposes other than meeting operation and maintenance expenses and debt service; i.e., the purpose is to allow excessive profits and the proposed rent change will result in rental rates in excess of what eligible tenants can afford.
- d. The State Director is able to provide RA to the project and the borrower's project is operated on either a nonprofit basis or limited profit basis as defined in § 1944.205(r) of Subpart E of Part 1944; but the borrower has not applied for RA within the most recent period of 180 days prior to the rent change request.

### VI. Rent Changes Requiring FmHA Prior Review Only

A. Rent changes caused by increases in operating costs for taxes and utilities, which are beyond the borrower's control, may be implemented with only prior FmHA review. The changes may not be greater than the amount necessary to cover the specific tax or utility increases.

1. Prior to notifying tenants, the borrower must meet or consult with the District Director to review:

- a. A new operating budget for borrower fiscal year showing:
  - (1) Currently approved budget.
  - (2) Actual income and expenses to date.
  - (3) Budget at new basic rents.
  - (4) Budget at new market rents (when applicable).

b. A copy of the notification to the borrower from the taxing body or vendor showing that taxes or utilities are being increased. The amount of the change or the basis on which the increased cost can be computed, must be shown in the notice.

c. Detailed calculations showing how the increased operating cost was determined.

d. An updated Exhibit A-5 to Subpart E of Part 1944, when the tenants pay their own utilities and the rent change involves increased utility costs.

e. A new energy audit or a listing of deferred improvements identified in a previous energy audit that was performed within the past five-year period according to the requirements of Exhibit D of this subpart or regulations then extant.

2. The District Director shall review the budget and supporting documentation and when found to be acceptable, notify the borrower in writing that the budget is approved. A copy of the approved budget will be forwarded to the State Director.

3. In addition to notifying each tenant of the new rents as required by State law, the borrower will:

- a. Include in the notice an explanation of the increased costs which necessitated the rent change.
- b. Mail a copy of the notice to the tenant at least 30 days prior to the effective date of the rent change.
- c. Offer the tenants an opportunity to meet with management, discuss the rent change and review all material necessitating the change.

d. Inform the tenants of their right to request a review of the rent change approval decision within 45 days of the date of the notice by writing to the next higher FmHA approval official. Until the request is resolved, the tenants are required to pay the changed amount of rent as indicated in the Notice of Approval.

B. Rent changes decreasing or not increasing tenant's total shelter cost (rent plus utilities), may be implemented with only prior FmHA review provided:

1. Prior to notifying tenants, the borrower must meet with the District Director to review:

- a. A new borrower fiscal year operating budget showing:
  - (1) Currently approved budget.
  - (2) Actual income and expenses to date.
  - (3) Budget at new basic rents.
  - (4) Budget at new market rents (when applicable).

b. Any material contributing to the change and justification for the change.

c. An updated Exhibit A-5 to Subpart E of Part 1944 when the change involves the tenant's utility allowance.

2. The District Director shall review the budget and supporting documentation, and when found to be acceptable, notify the borrower in writing that the budget is approved. A copy of the approved budget will be forwarded to the State Director.

3. In addition to any State requirements, the borrower notifies each tenant of the new rents and/or utility allowance as required by State law, and:

- a. Include in the Notice an explanation of the changes and events which necessitated the change. Also, the explanation must specify any adverse and/or positive effect the change may have on the tenants.

b. Mail a copy of the Notice to the tenant at least 30 days prior to the effective date of the rent change.

c. Offer the tenants an opportunity to meet with management to discuss the change and review any material contributing to the change.



d. Inform the tenants of their right to request a review of the rent change approval decision according to paragraph VI A 3 d of this Exhibit.

C. Rent changes to cover project operating and maintenance costs occurring in newly constructed or substantially rehabilitated RRH projects approved after November 30, 1983, may be approved with prior FmHA review only, provided:

1. The limit of rent change shall be the lesser of:

a. The actual past operating cost change incurred.

b. The amount of operating cost change incurred with respect to comparable rental dwelling units serving the project's market area. When no comparable dwelling units exist in the project's market area, the FmHA approval official may approve a rent change according to the best available data regarding operating cost change in rental units.

2. The same requirements of paragraphs VI B 1 and 2 above are met.

D. When the budget and supporting documentation for any rent changes authorized by this paragraph are not acceptable to the District Director, and the District Director and the borrower cannot jointly agree on a budget based on acceptable rents, the borrower will be notified in writing to reduce or rescind the proposed rent change. The borrower will be given appeal rights as specified in Subpart B of Part 1900 of this chapter.

#### VII. Unauthorized Rent Increases

When a borrower implements a rent change that does not meet the requirements of this Exhibit, the borrower will be notified in writing that: (1) the rent change has not been authorized, and (2) the rents must be rolled back to the last FmHA authorized level. Tenants affected by the unauthorized rent change will be given a rebate or credit for the unauthorized amount retroactive to the date of the unauthorized change. Those borrowers that fail to comply with the provisions of this paragraph will be handled according to § 1965.85(d) of Subpart B of Part 1900 of this chapter.

#### VIII. Automatic Annual Adjustment Factors for Section 8 Units

If the approval official disapproves a rental rate change requested as a result of HUD's automatic annual adjustment factors for units receiving Section 8 assistance, or approves a rent change for a lesser amount than the change permitted by HUD, the approval official must require the borrower to deposit any excess funds into the Reserve Account. If this results in an accumulation of funds in the Reserve Account beyond the sum shown in the Loan Agreement or Loan Resolution, the interest reduction on a Section 8/515 project should be adjusted or canceled by memorandum to the Finance Office. The borrower will still be required to operate on a limited profit basis.

#### IX. Special Problem Cases

Problem cases which cannot be handled under this subpart should be submitted to the National Office for review with the State Director's recommended plan of action.

35. Exhibit C-2 to Subpart C is revised to read as follows:

#### Exhibit C-2 of Subpart C—Notice of Approved Rent Change

Dear \_\_\_\_\_:

You are hereby notified that the Farmers Home Administration (FmHA) has approved a rent change for the \_\_\_\_\_

Project Name	Unit	Present Rent		Requested Rent		Approved Rent	
		Basic	Market	Basic	Market	Basic	Market

(Use the following required and/or optional paragraphs where applicable)

\*You must notify the tenants of FmHA's approval of the rent changes by posting this letter in the same manner as the "NOTICE TO TENANTS OF PROPOSED RENT CHANGE." This notification must be posted in a conspicuous place and cannot be substituted for the usual written notice to each individual tenant.

\*This rent change approval does not authorize you to violate the terms of any lease you currently have with your tenants.

\*\*For those tenants receiving rental assistance (RA), their costs for rent and utilities will continue to be based on the higher of 30% of their adjusted monthly income or 10 percent of gross monthly income or if the household is receiving payments for public assistance from a public agency, the portion of such payments which is specifically designated by that agency to meet the households shelter cost. If tenants are receiving Housing and Urban Development (HUD) Section 8 subsidy assistance, their costs for rent and utilities will be determined by the current HUD formula.

\*\*Since RA units are not available, the approved rent change is subject to your acceptance of the units should they become available. Your application for RA units on behalf of eligible tenants has been received.

\*\*This rent change is conditioned on the requirement that you carry out energy conservation measures as determined necessary by the project energy audit. You will be allowed \_\_\_\_\_ days for completion of the work. FmHA assistance may be available to finance any needed improvements.

\*You may file an appeal regarding the rent change as approved within 45 days of the date of this notice. An appeal by you must be in writing to the appropriate hearing officer as specified in Subpart B of Part 1900 of this chapter.

\*You must inform the tenants of their right to request a review of the rent change approval decision within 45 days of the date of this notice by writing to (insert name and address of next higher FmHA approval official). Until the request is resolved, the tenants are required to pay the changed amount of rent as indicated in the Notice of Approval.

\*Required.

\*\*Optional, as applicable.

project(s). The rental changes for all rental units will become effective on \_\_\_\_\_, 19\_\_\_\_. (Insert effective date shown in Exhibit C-1 or later effective date in accordance with last paragraph of Exhibit C-1.)

(Insert Reasons for Approval)

The approved rent changes are as follows:

\*Any tenant who does not wish to pay the FmHA approved rent changes may give the owner 30-days notice that they will vacate. The tenant will suffer no penalty as a result of this decision to vacate, and will not be required to pay the changed rent. However, if the tenant later decides to remain in the unit, the tenant will be required to pay the changed rent from the effective date of the changed rent.

Sincerely,

FmHA Approving Official

36. Exhibit D to Subpart C is amended in the first sentence of paragraph V, by removing the words "or appropriate" after the fifth comma.

37. Exhibit E to Subpart C is revised to read as follows:

#### Exhibit E of Subpart C—Rental Assistance Program

##### I. General

The objective of the rental assistance (RA) program is to reduce rents paid by low-income households. This Exhibit sets forth the policies and procedures and delegates authority under which RA will be extended to eligible tenants occupying eligible Rural Rental Housing (RRH) and Rural Cooperative Housing (RCH) projects financed by FmHA. This Exhibit also applies to Farm Labor Housing (LH) projects when the borrower is a broadly-based nonprofit organization, nonprofit organization of farmworkers, or a State or local public Agency. RA will supplement the benefits available to tenants under the interest credit program outlined in Exhibit B to Subpart E of Part 1944 of this chapter.

##### II. Definitions

A. *Eligible Tenants.* Any very low-income, or low-income household, elderly, disabled or handicapped person, meeting the following requirements:

1. The household adjusted annual income must not exceed the very low- or low-income limit established for the area as indicated in Exhibit C to Subpart A of Part 1944 of this chapter (available in any FmHA Office.)

2. The household must be unable to pay the approved rental rate plus utility allowance within a portion of their income not exceeding the highest of:



- (a) 30 percent of their adjusted monthly income; or
- (b) 10 percent of gross monthly income, or
- (c) If the household is receiving payments for public assistance from a public agency, the portion of such payments which is specifically designated by that agency to meet the household's shelter cost.

3. The household must meet the occupancy policy established for the project and approved by FmHA according to paragraph VLB.2. of Exhibit B of this subpart.

**B. Eligible Project.** 1. All projects must operate under Interest Credit Plan II RA to be eligible to receive RA, except LH loans, direct RRH, and insured RRH loans approved prior to August 1, 1968, which must operate under Plan RA. To be eligible for RA the project must have a:

- a. RRH insured or direct loan made to a broadly-based nonprofit organization, or State or local agency, including Senior Citizen Housing (SCH), or

- b. RRH insured loan to an individual or organization who has or will execute a Loan Resolution or Loan Agreement agreeing to operate the housing on a limited profit basis as defined in § 1944.205(r) of Subpart E to Part 1944 of this chapter, or

- c. RCH insured or direct loan, or

- d. LH loan, or an LH loan and grant combination, made to a broadly-based nonprofit organization or nonprofit organization of farmworkers or a State or local public Agency.

2. Borrowers may utilize the Department of Housing and Urban Development (HUD) Section 8 Housing Assistance Payments Program for existing housing and FmHA RA for other eligible households in the same project.

3. Projects with all or a part of the rental units under contract with HUD developed under the Section 8 program for new construction or rehabilitation, by either the dual or single track processing procedures will not be considered an eligible project for RA.

4. Borrowers may provide RA to only those eligible tenants occupying rental housing units financed by FmHA, LH, RCH, or RRH funds.

**C. Operational Project.** A completed RRH, RCH, or LH project financed by FmHA which has been opened for occupancy and has at least been partially occupied by tenants.

**D. New Projects.** Newly constructed or substantially rehabilitated RRH, RCH, or LH project financed by FmHA. For purposes, it further means before any units are occupied.

**E. Rental Assistance.** RA, as used in this Exhibit, is the portion of the approved shelter cost paid by FmHA to compensate for the difference between the approved shelter cost and the monthly tenant contribution as calculated according to paragraph IV.A.2.C. of Exhibit B to this Subpart. When the household's monthly gross tenant contribution is less than the approved utility allowance which is billed directly to and paid by the tenant, the owner will pay the household that difference according to paragraph IX.A.2. of this Exhibit.

**F. Shelter Cost.** The approved shelter cost consists of basic or market rent plus utility allowance, when required. Basic and/or

market rent must be shown on the project budget for the year and approved according to § 1930.124 of this subpart. Utility allowances, when required, are determined and approved according to Exhibit A-5 to Subpart E of Part 1944 of this chapter. Any change in rental rates or utility allowances must be processed according to Exhibit F to this subpart.

**G. Utility Allowances.** The allowance approved by FmHA according to Exhibit A-5 to Subpart E of Part 1944 of this chapter, to cover the cost of utilities which are payable directly by the households.

**H. Replacement Units.** RA units which replace RA units in RA agreements expiring because obligated funds have been fully disbursed.

### III. Utilization of Rental Assistance

All borrowers with eligible projects as defined in paragraph II. B. of this Exhibit are encouraged to utilize the RA program and receive RA payments on behalf of eligible tenants. Generally, the borrower, or the borrower's approved management agent, will initiate the processing of a RA application.

### IV. Priority of Rental Assistance Applications

**A. State Allocations.** The National Office may establish a State quota on the number of RA units that may be approved and obligated in any fiscal year. The State Director will limit the approval of RA to no more than the number of units allocated to the State. Unless otherwise stated by the National Office, the State allocation will indicate the number of RA units for operational projects and the number of RA units to be used for new construction. Priority in allocating RA units will be as follows:

**B. Allocation to Projects Within a State.** The State Director will distribute any RA units allocated to the State according to any specific guidance established by the National Office. When no specific guidance is established by the National Office the State Director will approve requests for RA to projects according to the provisions of this Exhibit.

1. **Replacement Units:** The State Director will distribute or reserve RA units and give priority to projects needing replacement units before any initial or additional units are allocated to other new or operational projects. The State Director should ascertain how many RA units are expected to expire in each District Office during the current fiscal year and the first quarter of the following fiscal year.

2. **New Housing:** Any RA units allocated to the State for new construction will be distributed on a priority basis in the following order:

- a. Applications for RRH and RCH loans where the market survey information indicates that a large percentage of the prospective tenants needed RA. When the number of RA units available is inadequate to cover all such applications, the units will be distributed giving priority to those projects located in areas identified as having the greatest housing needs and selected for funding in accordance with § 1944.231 of Subpart E of Part 1944 of this chapter.

- b. For LH projects, RA units will be allocated by the National Office from the National Office reserve on a case-by-case basis at the time the projects are considered for funding at the National Office level.

3. **Operational Housing:** When the National Office provides an allocation for servicing RA units, the State Director will distribute them to operational RRH, RCH, and LH projects based on Forms FmHA 1944-25, "Request for Rental Assistance" that have been submitted by eligible borrowers. Priority will be given to projects based on this exhibit and administrative directives issued by the National Office under the annual RA allocations or other authorizations or guidelines established through the budget process. The National Office will notify the State Director each year of any specific date by which all requests for RA must be submitted to FmHA for consideration.

### V. Processing of Rental Assistance Applications

All requests for RA will be processed according to this paragraph and may be approved by the State Director.

**A. Operational Projects.** 1. A borrower with an eligible project in which there are tenants paying in excess of 30 percent of their adjusted income for rent is encouraged to file Form FmHA 1944-25 with the District Director. A separate Form FmHA 1944-25 will be submitted for each project. The borrower should include the following with each request:

- a. Form FmHA 1944-29, "Project Worksheet for Interest Credit and Rental Assistance," with all columns completed for each tenant in the project. (All Forms FmHA 1944-8, "Tenant Certification" must be current.)

- b. Approved or proposed budget for the year on Form FmHA 1930-7, "Statement of Budget and Cash Flow," with Exhibit A-5 to Subpart E of Part 1944 of this chapter attached, when applicable.

2. Prior to the full disbursement of obligated funds on any agreement, a borrower or approved management agent may submit a request for replacement RA units. This request should contain all the material requested in paragraph V A 1 of this Exhibit and should be submitted no later than three (3) months prior to the expected full disbursement of obligated funds, to allow time for processing the request. The number of replacement units may not exceed the number of units that are expiring. Once replacement units have been requested, additional units may not be requested until Form FmHA 1944-51, "Multiple Family Housing Obligation Fund Analysis," is received obligating the replacement units. Form FmHA 1944-51 requesting the additional units must be coded sequentially as required in paragraph V C 5.

3. The District Director will review the budget, Exhibit A-5, Form FmHA 1944-29, and Form FmHA 1944-25 submitted by the borrower to assure that the items are complete and accurate. The District Director will complete Form FmHA 1944-25 and submit all data provided by the borrower to



the State Director with appropriate comments and recommendations.

**B. Projects To Be Funded.** 1. Applicants requesting funding for new projects who are planning to utilize the RA program, should submit a completed Form FmHA 1944-25 to the County Supervisor or District Director, as appropriate, when submitting a preapplication or application for funding.

2. The number of units of RA requested should be based on the market data for the area, the proposed rental rates as reflected in a budget for the project, and the income levels of the prospective tenants.

**C. State Director Action on Requests for Rental Assistance.** Only the State Director or delegated members of the State Office staff may approve or disapprove RA requests.

1. **Approval Actions.** When the State Director determines that RA can be obligated or transferred, Part III of Form FmHA 1944-51 for obligation, or Form FmHA 1944-55,

"Multiple Family Housing Transfer of Rental Assistance," for transfers, will be prepared and distributed according to the Forms Manual Insert (FMI). Form FmHA 1944-27, "Rental Assistance Agreement," will not be executed or amended until the obligation or transfer is verified by the Finance Office. The State Office will verify the obligation or transfer via the computer terminal, on the day following the request.

2. **Completing Agreements.** When the State Director verifies that RA units have been obligated or transferred by the Finance Office, the State Director will forward a copy of either Form FmHA 1944-51 or Form FmHA 1944-55 to the District Director. The District Director will complete Form FmHA 1944-27, and attach the appropriate copies of Form FmHA 1944-51 on Form FmHA 1944-55 according to the FMI.

a. **Initial Agreements.** The District Director will prepare an original and two copies of Form FmHA 1944-27. When the project does not have a Form FmHA 1944-7, "Multiple Family Housing Interest Credit and Rental Assistance Agreement," in effect, the District Director will prepare an original and three copies. The District Director and the borrower will then execute the originals and all copies of Form FmHA 1944-27 and Form FmHA 1944-7. The forms will be distributed according to their FMIs.

b. **Replacement or Modified Agreements.** When an RA agreement initiated prior to May 1, 1985, is replaced or modified, a new Form FmHA 1944-27 will be prepared and distributed according to the FMI. For every replacement or modification on or after May 1, 1985, the original and all copies of the affected RA agreement will be notated, assembled and distributed by the District Director according to the FMI.

3. **Modification of an Existing Agreement.** After any request for a change in the amount of RA has been obligated by the Finance Office, a copy of Form FmHA 1944-51 or Form FmHA 1944-55 will be attached to Form FmHA 1944-27 distributed according to the FMI. A new Form FmHA 1944-7 is not required.

4. **Denial of Rental Assistance Request.** If RA cannot be provided, the State Director will inform the borrower, in writing, of the reasons. The borrower will be given appeal

rights according to Subpart B of Part 1900 of this chapter in all cases except when RA is not available from the State's allocation or the National Reserve.

5. **Rental Assistance Agreement Numbers.** a. Each RA agreement will be assigned a six digit Rental Assistance Agreement Number by the Approving Official as follows:

(1) First two digits—Fiscal Year (FY in which the funds were obligated, i.e., 85, 86, etc.)

(2) Second two digits—Initial obligation for the project will be coded 01. Renewal obligations will be coded sequentially starting with 02.

(3) Third two digits—Initial obligation will be coded 01. Each modification where units are added to the agreement by obligation will be coded sequentially starting with 02.

b. RA Agreements with units obligated before FY 1985 will be coded as follows:

(1) First two digits—FY initial obligation was made on the project, i.e., 78, 79, 80, etc.

(2) Second two digits—Relate to the pre-AMAS conversion loan number to which the RA obligation was processed.

(3) Third two digits—Indicate the number of modifications plus 1. (RA Agreement with two modifications on September 30, 1984, will be designated "03.")

c. The Finance Office will track RA agreements by number and notify the District Office on Form FmHA 1951-53, "Multiple Family Housing Transaction Record."

#### VI. Terms of the Rental Assistance Agreement

A. **Effective Date.** Each "Rental Assistance Agreement" will be effective the first day of the month in which it is executed. If assistance is granted to a project under an appeal according to paragraph XVI of this Exhibit, the effective date will be retroactive to the first day of the month in which the assistance was denied, provided the borrower agrees to make any appropriate refunds to tenants who would have been entitled to RA during the retroactive period.

B. **Term.**—1. **Twenty (20) Year Agreement.** Twenty (20) year agreements when authorized are restricted to new projects or modifications of existing twenty (20) year agreements. The agreement shall be effective for twenty (20) years from the effective date of the agreement. This agreement may be modified or terminated in accordance with the terms of the RA agreement. The agreement will expire when the funds obligated for the RA units described in Section 1 of the agreement are fully disbursed. This can be any time before or after the end of the 20-year term. Upon expiration of the agreement, a replacement agreement may be executed. If a replacement agreement is considered, it will be for a five (5) year period.

2. **Five (5) Year Agreement.** Five (5) year agreements may be used for operational projects, or for new projects when twenty (20) year units are not available. The agreement shall be effective for five (5) years from the effective date of the agreement. This five (5) year agreement may be modified or terminated in accordance with the terms of the RA agreement. The agreement will expire when the funds obligated for the RA units

described in Section 1 of the agreement are fully disbursed. This can be any time before or after the end of the five (5) year period.

3. **Modification of Agreements.** RA agreements may be modified:

a. To add or subtract RA units assigned to the project through obligation or through transfer from another RA agreement;

b. To reinstate a suspended RA agreement to a new borrower in the same project after a voluntary conveyance or a foreclosure and a credit sale within the Multiple Family housing program; or

c. To transfer a suspended RA agreement to a new borrower and a different project after liquidation of the project assets or after the loan is paid in full.

4. **Amendment of Agreements.** a. Any existing RA agreement executed prior to February 15, 1983, which will have a remaining obligation balance at the end of the 5-year or 20-year expiration date stated in Section 9, "Term of the Agreement," may be modified by the use of Form FmHA 444-27A, "Amendment to Rental Assistance Agreement." The amended agreement will expire when the obligated funds are fully disbursed.

b. Any existing RA agreement containing an occupancy standard may be amended by mutual consent of the borrower and FmHA when a new occupancy policy for the project is approved according to paragraph VI B 2 of Exhibit B of this subpart. To amend the agreement:

(1) Delete Section 5 of the original agreement and the borrower's copy and have the deletion dated and initialed by the appropriate FmHA official and the person(s) authorized to sign for the borrower.

(2) Type the following statement on the reverse of the original agreement and the borrower's copy and have the statement dated and initialed by the appropriate FmHA official and the person(s) authorized to sign for the borrower.

"Amended \_\_\_\_\_ [date] by authority of paragraphs VI B 4 of Exhibit E and VI B 2 a of Exhibit B to Subpart C of Part 1930, Chapter XVIII, Title 7, Code of Federal Regulations."

5. **Replacement Agreements.** Replacement RA agreements for either 5-year or 20-year agreements will be for a five (5) year period. All requirements in paragraphs VI B 2 and 3 of this exhibit apply. Expiring RA agreements and replacement RA agreements may run concurrently for one month so any undisbursed obligation balance on the expiring RA agreement can be liquidated.

#### VII. Recordkeeping Responsibilities

A. The State Director will maintain Form FmHA 444-28, "Record of Rental Assistance Agreements." Any changes which are made in the number of rental units assisted will be recorded on Form FmHA 444-28.

B. The Finance Office (FO) will track the use of RA and ensure that RA is not disbursed or credited to a borrower's account in excess of the RA obligation. Quarterly and annually, the FO will provide the District Director with an RA payment and obligation status report for each project. The annual version of this report will be filed in Position



2 of the project case file and maintained indefinitely.

C. The District Director will notify the borrower to apply for replacement RA units when the RA Undisbursed Balance reaches a level sufficient to cover approximately 6 months of RA requests. This figure will be based on the project's average monthly request for RA.

D. Information on Form FmHA 2033-42, "Multiple Family Housing Information Status Tracking and Retrieval System" (MISTR), regarding balance of RA funds must be updated annually at the end of each fiscal year by the District Director and State Director.

#### VIII. Responsibilities of Borrower in Administering the Rental Assistance Program

The borrower and management agent for each project receiving RA should fully understand the responsibilities and requirements of carrying out the program. The following guidelines will be followed:

A. RA payments will not be made directly to eligible tenants receiving RA except as specified in paragraph IX A of this Exhibit. The borrower will maintain an accurate accounting of each tenant's utility allowance and payments made to tenants. All other RA payments will be recorded as a credit to the tenant's monthly rental payment.

B. The borrower must submit Form FmHA 1944-8 for each tenant as required in paragraph VII F of Exhibit B of this subpart (Management Handbook).

C. The incomes reported by the tenants must be verified by the borrower in accordance with paragraph VII of Exhibit B of this subpart (Management Handbook).

D. Borrowers utilizing RA must comply with § 1930.124 of this subpart. RA will not be approved for a project until the operating budget has been approved by the FmHA State Office or the District Director. District Directors, with assistance from the State Office, must closely supervise and assist borrowers in complying with all accounting and management requirements.

E. A borrower participating in the RA program must have an FmHA approved lease with the assisted household. All leases must comply with the provisions of paragraph VIII of Exhibit B of this subpart (Management Handbook).

F. The borrower will be responsible to FmHA for any errors made in the administration of the RA program which are made by the borrower or the borrower's authorized management agent. Errors in computation or other unauthorized use of RA will require, at a minimum, the repayment of any incorrectly advanced RA funds. If the error or unauthorized use of RA appears to be deliberate or intentional, the State Director will refer the case to the Office of Inspector General according to Subpart B of Part 2012 (available in any FmHA Office).

#### IX. Handling Utility Allowances

A. *Payment of Utilities.* 1. When the tenant is billed directly for utilities, rent paid by the tenant receiving RA will be the difference between the established utility allowance and the portion of income cited in paragraph II A 2 (a) or (b) or (c) of this Exhibit.

2. When utilities are paid by the household receiving RA and the portion of income cited in paragraph II A 2 (a) or (b) or (c) of this Exhibit is less than the allowance for utilities, the borrower will pay the household the difference between the utility allowance and one of those limits of the household's adjusted monthly income.

3. In a project where the owner pays all utilities, the tenant rent will be the portion of income cited in paragraph II A 2 (a) or (b) or (c) of this Exhibit up to the approved rent for the rental unit being occupied.

B. *Determining the Allowance.* The utility allowance will be determined and recorded by the use of Exhibit A-5 to Subpart E of Part 1944 of this chapter.

C. *Changes in Allowances.* The utility allowance should be reviewed annually and adjusted if there are substantial changes in utility and public service rates. Normally, allowances will be adjusted on an annual basis if necessary when the owner submits a new budget for approval. Changes in utility allowance which will result in changed rent paid by tenants will be processed according to Exhibit C of this subpart.

#### X. Method of Payment of Rental Assistance to Borrower

A. Regular monthly RA payments.

1. *Borrower Responsibilities.* a. Any RA due the borrower will be deducted from the balance of scheduled loan payments, any delinquent payments, and other charges due on Form FmHA 1944-29, and the remaining balance must be submitted to the District Office. If the RA due the borrower exceeds the balance of scheduled loan payments, delinquent payments and other charges, an RA check for the excess will be issued by the Finance Office.

b. Each month the borrower must forward to the District Director a separate Form FmHA 1944-29 and any new Form FmHA 1944-8, for each project according to the instruction attached to the form.

2. *District Director Responsibilities.* a. When a Form FmHA 1944-29 and new Form FmHA 1944-8 are received, the District Director will:

(1) Review Form FmHA 1944-8 and verify that the information contained on the form is complete and correctly computed based on information contained in the form.

(2) Review Form FmHA 1944-29 and ensure that entries are supported by the current Form FmHA 1944-8.

(3) Submit the borrower's payment and payment data to the Finance Office using Form FmHA 1944-9, "Multiple Family Housing Certification and Payment Transmittal."

b. The District Director should verify the accuracy of the borrower's servicing address shown on the Finance Office (FO) record. When the address shown is incorrect, Form FmHA 1944-50, "Multiple Family Housing Borrower/Project Characteristics," will be prepared and the FO record corrected via a field computer terminal. File Form FmHA 1944-50 in the borrower casefile.

B. When a project loan account is delinquent, the District Director should counsel with the borrower and develop a servicing plan in accordance with § 1965.85

(b) of Subpart B of Part 1965 of this chapter. This plan should incorporate detailed provisions for continuing operation of the project and paying the account current.

1. As part of the servicing plan, the District Director may agree to releasing a portion of the monthly RA for project operation. This amount will be shown in the "Amount of Rental Assistance Check" block on Form FmHA 1944-9. The check will be delivered to the District Director.

2. The RA Check may be released to the borrower according to the servicing plan.

C. An RA payment request must be based on actual occupancy as of the first day of the month.

#### XI. Assigning Rental Assistance To Tenants

A. *New Project.* Applications for occupancy should be accepted during the construction phase of the project and placed on a waiting list. During initial rent-up period the following priorities will apply:

1. Until all the RA units have been assigned, a number of apartment units in the project equal to the number of RA units will be initially reserved for applicant households who qualify for RA as defined in paragraph II A of this Exhibit. Applications qualifying for RA will be considered according to the priority established by paragraph XI B of this Exhibit, by-passing those applicants on the waiting list whose income is above the low-income limits for the area. The balance of the apartment units will be rented simultaneously to other applicants on a first-come-first-served basis.

2. If a substantial number of apartment units reserved to be used with RA units remain vacant after initial rent-up and the borrower could rent those units to applicants not eligible for RA, the borrower may consider requesting a transfer of unused RA units in accordance with Paragraph XV B 5 of this Exhibit. Applicants not eligible for RA cannot be selected to occupy units initially reserved to be used with RA until unused RA units are transferred.

3. If there are still vacant units, those applicants by-passed because they did not qualify for RA will be considered for occupancy on a first-come first-served basis.

B. *Operational Project.* To determine priority for assigning an available RA unit in an operational project, the latest Form FmHA 1944-29 must be updated as of the date the unit is available, assuring that columns 3 through 9 are current and accurate.

1. First priority for assigning RA must always be given to eligible very low-income households in the following order:

a. Eligible very low-income tenants paying the highest percentage of adjusted annual income for approved shelter costs.

b. *Eligible very low-income applicants from waiting list.* Very low-income applicants will be selected from the waiting list on a first come, first served basis as provided in paragraph VI E of Exhibit B to this subpart. No eligible tenant household in the project may be required to move from the project to allow an applicant on the waiting list who is eligible for RA, to move in.



2. Second priority for assigning RA will be given to eligible households with *low-income* in the following order.

a. *Eligible low-income tenants* paying the highest percentage of adjusted annual income for approved shelter cost.

b. *Eligible low-income applicants from waiting list.* Low-income applicants will be selected on a first come, first served basis according to paragraph VI E of Exhibit B of this subpart, provided the borrower has satisfied the requirements of paragraph XI C of this Exhibit.

3. Third priority for RA will be given, with State Director approval, to occupancy ineligible tenants living in the project. The occupancy requirements of paragraph VI B 2 of Exhibit B of this subject must be met.

4. When the project has vacancies and RA is not available, an applicant who is eligible for RA may elect to accept occupancy without the benefit of RA. After occupancy, the household will be considered for RA according to paragraph XI B of this Exhibit. If the applicant elects not to accept occupancy because RA is not available, their application will retain its priority date on the waiting list if the rental agent determines that a hardship to the applicant will exist according to paragraph VI E 3 of Exhibit B of this subpart.

5. Eligible tenants receiving the benefits of RA may continue receiving such benefits as long as they remain eligible for RA or the RA calculation formula shows a moderate income tenant that was initially eligible for RA as a low-income tenant still needs RA and there is a RA agreement in effect.

C. *Limits on Low-Income Applicants Which May Receive Occupancy and RA.* 1. When no more very low-income applicants are on the waiting list and RA is available, eligible low-income applicants may obtain occupancy and receive RA provided that:

a. For projects available for initial occupancy prior to November 30, 1983, no more than 25 percent of the vacant units receiving RA may become occupied by low-income tenants other than very low-income tenants.

b. For projects available for initial occupancy on or after November 30, 1983, no more than 5 percent of the vacant units receiving RA may become occupied by low-income tenants other than very low-income tenants.

2. The borrower may rent units and provide RA to other than very low-income applicants/tenants in excess of the percentage in paragraph XI C 1 a and b above, respectively, when no more very low-income applicants/tenants are in the market area. The borrower must have in its file and available to FmHA or its representative documentation that shows the efforts made, and the facts used to determine that there are no more very low-income applicants in the market value.

D. *Assigning Rental Assistance Other Than the First of the Month.* 1. When a tenant receiving RA vacates before the end of the month, the RA unit should be immediately reassigned to another tenant or an applicant using the priorities given in paragraph XI B of this Exhibit.

2. When RA is assigned to an applicant and the applicant initially enters the project on a

day other than the first of the month, the applicant's tenant contribution for housing costs will be prorated for the remaining portion of the month the same as if the tenant was receiving RA. [Example: Basic rent of \$200 and the tenants monthly contribution with RA would be \$120, the prorata amount for 1/2 month would be \$60.]

3. When RA is assigned to a tenant other than the first of the month, no adjustment to their tenant contribution on Form FmHA 1944-29 for that month will be made. The tenant will begin to receive the benefits of RA as of the first day of the next month.

4. No adjustment will be made on Form FmHA 1944-29 to request additional RA payment or to refund any excess RA payment or overage when RA is reassigned other than the first of the month.

#### XII. Rental Assistance Assigned to Wrong Household

When the tenant has correctly reported income and household size, but RA was assigned to a household in error, that tenant's RA benefit should be cancelled and reassigned. Incidents involving incorrect reporting are addressed in 7 CFR Part 1951 Subpart N (FmHA Instruction 1951-N, available in any FmHA Office.)

A. Before the borrower notifies the tenant, the borrower or management agent shall review the case with the District Director. If the District Director verifies that an error has been made based on information available at the time the unit was assigned, the tenant will be given 30 days written notice that the unit was assigned in error and that the RA benefit will be cancelled effective on the next monthly rental payment due date after the end of the 30 day notice period. The tenant will also be notified in writing that:

1. The tenant has the right to cancel the lease based on the error made by the borrower and the loss of benefit to the tenant.

2. The RA granted in error will not be recaptured from the tenant.

3. The tenant may meet with management to discuss the cancellation and the facts on which the decision was based. If the facts are accurate and the tenant cannot produce further evidence proving eligibility for RA, there will be no appeal from the decision. If the tenant feels there is justification for further review the borrower must give the tenant appeal rights under Subpart L of Part 1944 of this chapter.

B. *Reassigning rental assistance.* 1. The RA unit will be reassigned to the household which was erroneously denied the RA unit. The assignment will be based on the Form FmHA 1944-29 from which the original priority was established, when the unit was erroneously assigned. The RA will not be retroactive unless the reassignment was based on an appeal by the tenant. Retroactive RA may not exceed the project's remaining RA obligation balance.

2. If the originally denied household now has RA, or is no longer a resident, the RA will be assigned based on a current Form FmHA 1944-29 and the priorities in paragraph XI of this Exhibit.

#### XIII. Rental Assistance Payment Cancellation

When a RA check must be cancelled, the following procedure will be followed:

A. *Return of the original rental assistance Treasury Check:* The District Office will prepare Form FmHA 1944-53, as specified in the FMI and mail it to the MFH unit in the Finance Office.

B. *Return of all or a portion of the monthly rental assistance payment or refund of rental assistance previously advanced:* A check from the borrower made payable to Farmers Home Administration (FmHA) will be submitted to the MFH Unit in the Finance Office on Form FmHA 1944-53, completed according to the FMI.

#### XIV. Terminating Existing Rental Assistance Agreements Obligated in Prior and/or Current Fiscal Years

A. When a project's obligated funds are fully disbursed under any given RA agreement number, RA will be automatically terminated by the Finance Office. The Finance Office will notify the District Office on Form FmHA 1951-51. The District Office will notify Form FmHA 1944-27 according to the FMI to indicate that a termination has occurred. The District Director will notify the borrower in writing that the obligation under the RA agreement number has expired and the RA agreement number must be stricken from the agreement.

1. *For all RA obligations before FY 1985.*

RA is considered fully disbursed by the Finance Office when all RA funds obligated before FY 1985 are disbursed.

2. *For all RA obligations after FY 1984.* RA is considered fully disbursed by the Finance Office when all RA funds obligated in a particular FY are disbursed. This includes RA transferred from a different MFH project.

3. When an RA agreement (Form FmHA 1944-27) consists of several different obligations (Form FmHA 1944-51, Part III, or Form FmHA 1944-55) identified by different RA agreement numbers, and the obligations will not be fully disbursed at the same time, only those RA agreement numbers with fully disbursed obligation will be terminated.

B. *Prior to Full Disbursement of Obligated Funds:*

1. *Prior Fiscal Year Obligations.* Prior fiscal year (FY) obligations will not be terminated. They will be suspended by the State Director using procedures in paragraph XV of this Exhibit.

2. *Current Fiscal Year Obligations.* The State Director is authorized to terminate RA agreements prior to the disbursement of obligated funds if the funds were obligated during the current FY. The undisbursed funds for the RA obligation will be returned to the current FY obligation authority.

#### XV. Suspending or Transferring Existing Rental Assistance Agreements

A. RA may be suspended or transferred according to the requirements for each situation described in paragraph XV B of this Exhibit and the following:

1. *Suspension.* a. The State Director may approve a suspension of a project's RA agreement and obligation as a result of the



servicing actions described in paragraph XV B 2, 3, and 4 of this Exhibit. The State Director will maintain records and control of the suspended RA.

b. The District Director will notify the borrower in writing and the Finance Office by memorandum.

c. After notification, the Finance Office will suspend all RA payments to the affected project.

d. The State Director may reinstate the RA to the same borrower in the same project, by memorandum to the Finance Office.

2. *Transfer.* a. Only the State Director may approve a RA transfer.

b. RA may be transferred to any borrower with an RA eligible project according to the priorities established by this Exhibit or the National Office.

c. The amount of RA which may be transferred must be:

(1) A specific unit and dollar amount. The dollar value of each RA unit to be transferred will be determined by dividing the transferring project's total remaining RA obligation(s) balance in the transferring RA agreement by the total number of obligated RA units in the RA agreement.

(2) A unit and dollar value equal to or less than those shown on the current RA agreement for the transferring project for example, a portion of an RA agreement unit and remaining obligation dollar value may be transferred.

d. RA units identified by different RA agreement numbers must be transferred with separate RA agreement numbers on Form FmHA 1944-55.

e. When the State Director approves an RA transfer, Form FmHA 1944-55 completed according to the FMI, will be used to notify the Finance Office except as noted in paragraph XV B 1 of this Exhibit.

f. Form FmHA 1944-27, with Form FmHA 1944-55, attached will be completed according to the FMI for each transferee. The transferee's RA agreement will be modified by attaching a copy of Form FmHA 1944-55 according to the FMI to indicate that a portion of the agreement has been transferred. When all the RA units on a RA agreement have been transferred, the transferor's present agreement will be so documented.

B. RA may be suspended and/or transferred in the following situations according to the following directions:

1. *RA transfer accompanying a loan transfer.* When a loan is transferred to an eligible borrower, the transferee may assume the transferor's RA agreement. The RA will be transferred using Form FmHA 1944-55 which will be forwarded to the Finance Office with Form FmHA 1965-9, "Multiple Family Housing Assumption Agreement" as required in § 1965.05 (c)(11) of Subpart B of Part 1965 of this chapter.

2. *Suspension and transfer after a voluntary conveyance.* When a project with RA is voluntarily conveyed to the Government, the RA will be suspended rather than cancelled. When Form FmHA 1965-19, "Multiple Family Housing Advice of Mortgaged Real Estate Acquired," is sent to the Finance Office, Form FmHA 1944-55 must be attached indicating the Code 4 status of

the suspended RA units according to the FMI. If the project is sold through a credit sale within the program, the suspended RA may be transferred to the project's new borrower, or a different project if it is not needed.

3. *Suspension and transfer after a liquidation.* When a project with RA is liquidated through sale outside of the program or the loan is paid in full, the RA will be suspended and, subsequently, transferred to a different FmHA financed project.

4. *Suspension and transfer or reinstatement due to a servicing action.* a. When servicing a project's account according to § 1965.85 of Subpart B of Part 1965 of this chapter and the account is accelerated, the RA will be suspended and either:

(1) Transferred with the project to a new borrower when all appeals and redemption periods of the defaulting borrower have expired and a credit sale is to be completed, or

(2) Transferred to a different project if the defaulting project is subsequently sold outside the program, or

(3) Reinstated to the same project when the defaults are corrected and the State Director reinstates the borrower's account.

b. The borrower will be apprised of the appeal rights available under Subpart B of Part 1900 of this chapter upon notification of the pending suspension. The suspension will not be effective until these appeal rights have been exhausted.

5. *Transfer of unused RA.* When RA is unused after initial rent-up and not needed because of a lack of eligible potential tenants in the area, all or a portion of it may be transferred when the State Director determines that the following conditions have been met:

a. *The borrower demonstrates that:* (1) The original market survey completed according to Exhibit A-6 of Subpart E of Part 1944 of this chapter clearly indicates no significant need for rental housing by households in the market area that would require RA for occupancy, and that there are no eligible tenants in the project not receiving RA or there are no eligible applicants on the waiting list who could use RA when obtaining occupancy. The State Director may require a new market survey for the project to make this determination if the original market survey does not adequately address potential very low-income tenants in the area, or does not reflect current market conditions.

(2) When the market survey indicates that there is a significant need for rental housing by households in the market area that would have required RA for occupancy, but all or a substantial portion of the RA units available remain unused after a two-year period since initial availability, the borrower must demonstrate that:

(i) A good faith effort was made to market the project to RA eligible applicants;

(ii) The waiting list does not contain RA eligible applicants and the project is not occupied by RA eligible tenants who do not receive RA; and

(iii) Project management has not used a policy of discouraging RA eligible households from applying for or obtaining tenancy in the project.

(3) Rent increases anticipated for the following two years will not prompt a request for RA according to the provision of Exhibit C of this subpart.

b. The District Director recommends the RA transfer after reviewing documentation submitted by the borrower and finding that the applicable conditions of paragraph XV B 5 of this Exhibit have been met.

6. *Transfer due to an uncloseable loan.* When RA will be unused because the loan to which it was obligated will not be closed, or the RA agreement is not signed, the RA obligation may not be transferred except as provided under the conditions of § 1944.235 (b) of this chapter. However, if this situation occurs during the same FY of obligation, the obligation should be cancelled and reobligated immediately using current authorities. Obligations from prior fiscal year must be cancelled and will be lost unless the conditions of § 1944.235 (b) of Subpart E of Part 1944 of this chapter exist.

#### *XVI. Rights for Appeal if Rental Assistance Is Not Granted or Is Cancelled by Farmers Home Administration*

A. Borrowers who have requested RA in writing and are denied such assistance (whether in whole or in part) by FmHA, or when RA is cancelled, will be notified in writing of the specific reasons why they have been denied RA as specified in Subpart B of Part 1900 of this chapter.

B. If at any time a borrower or a household is granted RA under an appeal, the borrower or household will receive the next available RA unit.

C. Borrower denial of RA to tenants will be handled according to Subpart L of Part 1944 of this chapter.

#### *XVII. Forms and Exhibits*

Exhibit A-5 to Subpart E of Part 1944 of this chapter and Form FmHA 1944-7 are to be used in determining the amount of RA to be provided.

38. In addition to the amendments set forth above, 7 CFR Part 1930 is amended by removing the words "45 days" and inserting the words "60 days" in the following places:

(a) § 1930.124(b);

(b) Exhibit A-1, paragraph IV B 1 c; item 5. of the Evaluation Checklist for Audit Reports, and item 3. of the Example Audit Review Letter;

(c) Exhibit B-7, wherever it appears under the column entitled "Due dates."

#### **PART 1944—HOUSING**

39. The authority citation for Part 1944 continues to read:

Authority: 42 U.S.C. 1480; 7 CFR 2.23; 7 CFR 2.70.



#### Subpart D—Farm Labor Housing Loan and Grant Policies, Procedures and Authorizations

40. Section 1944.178 is amended by revising paragraphs (b), (c), (d), (e) and (g) to read as follows:

##### § 1944.178 Complaints regarding discrimination in use and occupancy of LH.

(b) The District Director or State Director will acknowledge receipt of the complaint and promptly forward it to the Administrator, Attention: Director, Equal Opportunity for submission to the Department's Office of Advocacy and Enterprise Equal Opportunity.

(c) Attached to the complaint should be a statement from the District Director or State Director as to whether the security instrument or other document executed by the borrower contains an assurance agreement. The statement also should include any other information which the State Director or District Director has pertaining to the complaint. The District Director or State Director will not initiate a comprehensive investigation of any complaint until requested to do so by the National Office.

(d) The Department's Office of Advocacy and Enterprise, Equal Opportunity will determine whether discrimination did in fact occur.

(e) If it is found that the borrower's assurance agreement in the security instrument or elsewhere was violated, FmHA will inform the parties of such finding and advise the violator to take the action necessary to correct the violation and to give appropriate assurance of future compliance.

(g) If the borrower fails to take such corrective action and assure future compliance, the Administrator will take further appropriate action as sanctioned by Subpart E of Part 1901 of this chapter.

##### § 1944.182 [Amended]

41. Section 1944.182 is amended in the fifth sentence by changing "Form FmHA 444-8" to "Form FmHA 1944-8."

##### § 1944.200 [Amended]

42. Section 1944.200 is amended in the first sentences of paragraphs (a)(1) and (a)(2) by adding the words "very low-" before the words "low- and moderate-income . . ."

43. Exhibit A to Subpart D is amended in the first sentence of the second paragraph by adding the words "very low- and" before "low-income farmworkers."

#### Subpart E—Rural Rental Housing Loan Policies, Procedures, and Authorizations

44. § 1944.205 is amended by revising paragraphs (b), (c), the heading of paragraph (d), paragraph (f), paragraphs (i) and (j), and by adding paragraph (cc) to read as follows:

##### § 1944.205 Definitions.

(b) *Elderly (Senior Citizen)*. A person who is at least 62 years old. The term elderly, or senior citizen, also means persons with the following handicap or disabilities, regardless of age:

(1) *Handicapped*. (i) Inability to engage in any substantially gainful activity by reason of any medically determinable physical or mental impairment which:

(A) Has lasted or can be expected to last for a continuous period of not less than 12 months or which can be expected to result in death, and

(B) Substantially impedes his or her ability to live independently, and

(C) Is of such a nature that such ability could be improved by more suitable housing conditions.

(ii) In the case of a blind person who is at least 55 years old (within the meaning of "blindness" as determined in Section 223 of the Social Security Act), is unable because of the blindness to engage in substantially gainful activity requiring skills or abilities comparable to those of any gainful activity in which he/she has previously engaged with some regularity over a substantial period of time.

(2) *Disabled*. In the case of developmental disability, a person with a severe, chronic disability which:

(i) Is attributable to a mental or physical impairment or combination of mental or physical impairment;

(ii) Is manifested before the person attains age 22;

(iii) Is likely to continue indefinitely;

(iv) Results in substantial functional limitations in three (3) or more of the following areas of major life activity:

(A) Self-care,

(B) Receptive and expressive language,

(C) Learning,

(D) Mobility,

(E) Self-direction,

(F) Capacity for independent living,

(G) Economic self-sufficiency, and

(v) Reflects the person's need for a combination and sequence of special, interdisciplinary or generic care or treatment, or for other services which are of lifelong or extended duration and are individually planned and coordinated.

(c) *Resident assistant*. A person(s) residing in a housing unit who is essential to the well-being and care of the elderly, disabled or handicapped person(s) residing in the unit and who is not related by blood, marriage, or operation of the law to these tenants. The resident assistant is not considered to be part of the household and is not subject to the eligibility requirements of a tenant. The resident assistant receives compensation from sources other than FmHA.

(d) *Very low, low or moderate income household*. \* \* \*

(f) *Eligible occupants*. Eligible occupants in a project may be either the elderly, disabled, handicapped, or very low-, low- and moderate-income households, or any combination thereof, as planned for the project and shown on the applicant's loan resolution or loan agreement, and who comply with the occupancy policy of the borrower as governed by the provisions of paragraph VI B 2 of Exhibit B to Subpart C of Part 1930. The term "occupant" also includes the term "tenant" as used in this Subpart. The occupant must:

(1) Be eligible households usually living in the local community and the surrounding area capable of caring for themselves. However, in the case of congregate housing with supportive services, this may include elderly or handicapped persons who require some supervision and central services, but are otherwise able to care for themselves. All occupants must meet the following criteria:

(i) Occupants must not be totally dependent on others to be able to vacate the unit for their own safety in emergency situations. Tenant households are eligible for occupancy when a member of the household is disabled if adequate care and assistance is provided by the tenant household for the safety and well-being of the disabled household member.

(ii) Occupants must be able to provide for their own sustenance in projects that provide less than full food service.

(iii) The occupant or legal guardian must possess the legal capacity to enter into a lease agreement.

(iv) The tenant or co-tenant must be of legal age.

(2) For a direct loan or a loan developed under Plan I, be:

(i) An elderly, handicapped or disabled person with a very low-, low- or moderate-income, or

(ii) Any household with a very low- or low-income.

(3) For loans developed under Plan II, be a person(s) with a very low-, low- or moderate-income.



(4) For all other loans be a person(s) with a very low-, low- or moderate-income or an elderly, handicapped or disabled person(s) without regard to income.

(5) In the case of cooperative housing projects all members (occupants) must be very low-, low- or moderate-income; except that, any member who is admitted as an eligible tenant of the cooperative may not subsequently be deprived of his/her membership or tenancy by reason of no longer meeting the income eligibility requirements as outlined in Exhibit C of Subpart A of Part 1944 of this chapter.

(i) *Related facilities.* Related facilities may consist of community rooms or buildings, site manager's apartment unit, cafeterias, dining halls, appropriate recreation facilities, and other essential service facilities such as central heat and cooling, sewerage, light systems, ranges and refrigerators, clothes washing machines and clothes dryers, and a safe domestic water supply. Under special conditions, such as a congregate housing project or a project housing handicapped tenants, space may be provided for cafeterias, dining areas, an infirmary, therapy room, special bathing room, and other special areas needed by the elderly and handicapped tenants when determined to be economically feasible. The cost of kitchen equipment such as stoves, ovens, steam tables and other such items may be included in the RRH loan. However, the cost of specialized equipment such as that used for training and therapy will not be included in the RRH loan to equip these facilities. When ranges, refrigerators, dish washing machines, dish dryers and other kitchen equipment are included, they will be attached to the real estate in a manner to prevent easy removal.

(j) *Project.* A project is the total number of rental housing units in one community such as a densely settled area, town or village, operated under one management plan with one loan agreement or resolution.

(cc) *Elderly family.* A household where the tenant or co-tenant is at least 62 years old or handicapped or disabled as defined in § 1944.205(b). An elderly family may include a person(s) younger than 62 years of age who is essential to the elderly, handicapped or disabled person's care and well-being. (To be eligible for an elderly family deduction, the elderly, handicapped or disabled person must be the tenant or co-tenant.)

45. Section 1944.211 is amended by adding paragraph (c) to read as follows:

#### § 1944.211 Eligibility requirements.

(c) *Eligibility of tenants.* Eligibility requirements for tenants are specified in Exhibit B to Subpart C of Part 1930 of this chapter.

#### § 1944.215 [Amended]

46. Section 1944.215 (i)(1) is revised to read as follows:

#### § 1944.215 Special conditions.

(i) \* \* \*

(1) Eligible occupants must meet the requirements of Exhibit B of Subpart C of Part 1930.

#### § 1944.215 [Amended]

47. Section 1944.215 (i)(4) is amended by inserting "very low-" between the words "eligible" and "low- or moderate-income."

48. Section 1944.235 is amended by revising paragraphs (i)(1) and (i)(3) to read as follows:

#### § 1944.235 Actions subsequent to loan approval.

(i) \* \* \*

(1) The District Director will review the applicant's marketing plan to determine that it is complete with all supplemental information provided. If the plan needs modification before marketing activity begins, approval must be granted by the loan approval official. The District Director will review the approved operating budget to determine if it is still adequate for the initial operating period. If it is not adequate, a rent change will be made according to paragraph VI C of Exhibit C of Subpart C of Part 1930 of this chapter.

(3) Prior to initial occupancy of any tenant, the District Director and the applicant will reconvene to assess implemented and marketing activity by thoroughly reviewing the marketing plan, anticipated occupancy results and the extent of achievement of plan objectives. If original marketing concepts prove to be less than effective, and/or if there are changes in the housing market, the applicant will be required to modify the marketing plan for the project. Should the District Director determine the applicant in noncompliance to the plan and a modification to the plan not warranted, the matter will be referred to the FmHA Administrator, attention Equal Opportunity Officer, through the State FmHA Compliance Officer.

49. Exhibit B to Part 1944 is amended by revising paragraphs IV.A.1, IV.B.1, VI.F. and VIII. to read as follows:

#### Exhibit B to Subpart C—Interest Credits on Insured RRH and RCH Loans

#### IV. \* \* \*

##### A. \* \* \*

1. Borrowers operating under this plan must agree to limit occupancy of the housing to very low- or low-income nonelderly and very low-, low- and moderate-income elderly, disabled or handicapped persons.

##### B. \* \* \*

1. Borrowers operating under this plan must agree to limit occupancy of the housing to households, including disabled and handicapped persons with very low-, low- and moderate-incomes. Under Plan II, interest credits are based on the cost of operating the project and the size and income of the household.

##### VI. \* \* \*

F. *Understanding Eligibility.* The borrower should understand the eligibility requirements for occupancy of the housing. Instructions for tenant's eligibility may be found in paragraph VI B of Exhibit B to Subpart C to Part 1930 of this chapter (Multiple Housing Management Handbook).

#### VIII. Tenant Certification

Tenant certification and recertification for interest credit borrowers will be performed in accordance with paragraph VII of Exhibit B to Subpart C to Part 1930 of this chapter.

50. In addition to the amendments set forth above, 7 CFR 1944, Subpart E is amended by changing the references from "Form FmHA 444-8" to "Form FmHA 1944-8" in the following places:

- (a) Exhibit B, paragraph IV.B.2.c.;
- (b) Exhibit H, paragraph VII.

#### PART 1951—[AMENDED]

51. The authority citation for Part 1951 continues to read:

Authority: 42 U.S.C. 1480; 7 CFR 2.23; 7 CFR 2.70.

52. Section 1951.506 is amended by revising paragraphs (a)(2) and (a)(5) to read as follows:

#### § 1951.506 Processing payment.

##### (a) \* \* \*

(2) The borrower must mail all Forms FmHA 1944-8, "Tenant Certification," or for tenants receiving Section 8 assistance, the acceptable Department of Housing and Urban Development (HUD) form, to the District Director on the same day, or before, the tenant occupies the unit. The District Director will verify the information on the tenant



certification as required in paragraph VII F of Exhibit B to Subpart C of Part 1930 of this chapter. The data from the verified tenant certification should be entered on a "master" Form FmHA 1944-29, "Project Worksheet for Interest Credit and Rental Assistance" filed with the current tenant certifications in the District Office Servicing file. Only tenants with current tenant certifications shown on this "master" list may be certified for interest credit or rental assistance.

(5) Form FmHA 1944-29, prepared by the borrower must reflect the following:

(i) Only tenants occupying units the first day of the month for which payment is due.

(ii) Interest credit and rental assistance may be claimed only for tenants with current tenant certification as specified in paragraph VII F 2 of

Exhibit B to Subpart F of Part 1930 of this chapter.

(iii) Overage up to the market rent must be paid to FmHA by the borrower for tenants without current tenant certifications unless there is a formal eviction in process, then the payment will be calculated based on the expired tenant certificate. The District Director may determine that the tenant may be required to reimburse the borrower for that overage as allowed in paragraph VII F of Exhibit B to Subpart C of Part 1930 of this chapter.

(iv) The borrower may subtract any rental assistance due the project (supported by current tenant certifications) from the payment due and remit a "net" payment. Calculations supporting the "net" payment must be shown on Part I of Form FmHA 1944-29.

## PART 1965—REAL PROPERTY

53. The authority citation for Part 1965 continues to read:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70.

### Subpart B—Security Servicing for Multiple Housing Loans

#### §1965.65 [Amended]

54. Section 1965.65 (c)(6) is amended by changing the reference from "Form FmHA 444-8" to "Form FmHA 1944-8."

Dated: June 4, 1986.

Kathleen W. Lawrence,

*Acting Under Secretary for Small Community and Rural Development.*

[FR Doc. 86-16187 Filed 7-31-86; 8:45 am]

BILLING CODE 3410-07-M



# Forest Practice

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Friday  
August 1, 1986

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## Part III

## Department of the Interior

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Office of the Secretary

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43 CFR Part 11

Natural Resource Damage Assessments;  
Final Rule



## DEPARTMENT OF THE INTERIOR

## Office of the Secretary

## 43 CFR Part 11

## Natural Resource Damage Assessments

AGENCY: Department of the Interior.

ACTION: Final rule.

**SUMMARY:** This final rule establishes procedures for assessing damages to natural resources resulting from a discharge of oil or a release of a hazardous substance and compensable under either the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), also known as Superfund, or under the Clean Water Act (CWA). Responsibility for preparation of this rule was delegated by the President to the Department of the Interior by Executive Order on August 14, 1981.

This rule is for the use of authorized Federal and State officials referred to in CERCLA as "trustees" for natural resources. Federal trustees are those management agencies designated as trustees in subpart G of the National Oil and Hazardous Substances Contingency Plan (NCP). State trustees are authorized representatives of States who may bring claims under sections 107 and 111 of CERCLA. The procedures in the rule will assist authorized officials to perform natural resource damage assessments for use in court actions or administrative proceedings when seeking compensation for injuries to natural resources.

Section 301(c) of CERCLA requires the promulgation of two types of regulations, standard and simplified "type A" procedures, and alternative "type B" procedures to be used in individual cases. This rule consists of the alternative methodologies referred to as the "type B" procedures. This rule does not provide guidance for simplified assessments referred to as the "type A" procedures. The "type A" procedures were proposed in a Notice of Proposed Rulemaking on May 5, 1986 (51 FR 16636).

Natural resource damage assessments are not identical to response or remedial actions (cleanup) addressed by the larger statutory scheme of CERCLA and the CWA. Assessments are not intended to replace response actions, which have as their primary purpose the protection of human health, but to supplement them, by providing a process for determining proper compensation to the public for injury to natural resources.

**DATES:** The effective date of the final rule is September 2, 1986.

The incorporation by reference of certain publications listed in this rule was approved by the Director of the Federal Register and is effective September 2, 1986.

**ADDRESS:** CERCLA 301 Project, Room 4354, Department of the Interior, 1801 C Street NW., Washington, DC 20240 (Regular business hours 7:45 a.m. to 4:15 p.m., Monday through Friday.)

**FOR FURTHER INFORMATION CONTACT:** Keith Eastin, (202) 343-5183; Alison Ling, (415) 556-8807; David Rosenberger, (202) 343-1301; Willie Taylor (202) 343-7531.

**SUPPLEMENTARY INFORMATION:** This rule was issued as a proposed rule on December 20, 1985 (50 FR 52126), with comments requested by February 3, 1986. The comment period was extended on February 4, 1986 (57 FR 4397), to February 18, 1986, and extended a second time to March 21, 1986 (51 FR 5376).

Throughout this preamble, language has been extracted from the preamble of the proposed rule, where such language is still appropriate, in order to ensure a clear understanding of the underlying principles contained in this final rule.

The contents of this preamble are listed in the following outline:

- I. Background
  - A. Statutory Background
  - B. Regulatory Background
  - C. "Type A" Regulations
- II. Overview of the Rule
  - A. Introduction
  - B. The Natural Resource Damage Assessment Process
  - C. Concepts Embodied in the Rule
  - D. Resource Related Issues
  - E. Economic Issues
  - F. Glossary
- III. Responses to Comments
  - A. Revisions to Subpart A
  - B. Revisions to Subpart B
  - C. Revisions to Subpart C
  - D. Revisions to Subpart D
  - E. Revisions to Subpart E
  - F. Revisions to Subpart F
  - G. Revisions to Appendix I
- IV. Special Resources
  - A. The Concept of Special Resources
  - B. Comments Received
  - C. Responses to Comments

## I. Background

## A. Statutory Background

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, requires in section 301(c) the promulgation of rules for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a discharge of oil or a release of a hazardous substance for the purposes of CERCLA and of section 311(f)(4) and (5)

of the Clean Water Act (CWA), also known as the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* Section 301(c) of CERCLA states:

(c) (1) The President, acting through Federal officials designated by the National Contingency Plan published under section 105 of this Act, shall study and, not later than two years after the enactment of this Act, shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this Act and section 311(f)(4) and (5) of the Federal Water Pollution Control Act.

(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

(3) Such regulations shall be reviewed and revised as appropriate every two years.

This rule is available for use by Federal and State authorized officials acting as trustees of natural resources to assess damages to natural resources for purposes of sections 107(a) and 111(a) and (b) of CERCLA and section 311(f)(4) and (5) of the CWA. Use of this rule is optional. The results of an assessment performed in accordance with this rule by a Federal authorized official acting as a trustee will be given the status of a rebuttable presumption. When injuries occur to natural resources resulting from a discharge of oil or release of a hazardous substance, the Federal or State agency acting in its role as trustee may seek, from the responsible party, damages for those injuries through a CERCLA or CWA action, or may seek restoration or replacement costs, in the case of a release of a hazardous substance, from the Hazardous Substance Response Trust Fund.

Section 107(a) establishes liability for "... damages for, injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." This language is the basis for seeking damages from responsible parties. Section 107(f) describes the role of a trustee and authorizes Federal and State agencies to assume that role. Section 111(a) and (b) permit the payment of claims asserted



for injury, destruction, or loss of natural resources, including the cost of damage assessments from the Hazardous Substance Response Trust Fund. Section 311(f)(4) of the CWA establishes responsible party liability for costs incurred by the Federal or State governments in the restoration or replacement of natural resources injured or destroyed as a result of a discharge of oil or release of a hazardous substance.

Section 301(c) of CERCLA specifies two types of procedures to be developed. The type A procedures are to be standard procedures for simplified assessments requiring minimal field observation. The type B procedures are to include alternative methodologies for conducting assessments in individual cases.

This rule does not include procedures for the filing of claims for natural resource damages against the Hazardous Substance Response Trust Fund. Rules for that purpose have been promulgated by the Environmental Protection Agency (EPA), at 40 CFR Part 306.

#### B. Regulatory Background

This rule has been developed under a court-imposed deadline. Section 301(c) of CERCLA required its promulgation by December 11, 1982. By Executive Order 12316, August 14, 1981 (46 FR 42237), responsibility for preparation of the rule was delegated to the Department of the Interior. On January 10, 1983 (48 FR 1084), the Department issued an Advance Notice of Proposed Rulemaking (ANPRM) seeking comment from the public concerning how to approach the development of the regulations. A second Advance Notice of Proposed Rulemaking appeared on August 1, 1983 (48 FR 34768) summarizing the comments received from the January notice. In December 1983, the State of Montana filed suit against the Department of the Interior for failure to promulgate the regulations. That suit was voluntarily withdrawn, but was followed by two new cases, one brought by the State of New Jersey and the New Jersey Department of Environmental Protection, and the other brought by the New Mexico Health and Environment Department, the State of Louisiana, Public Citizen, the National Wildlife Federation, and the Environmental Defense Fund. The court ruled on December 12, 1984, in *State of New Jersey et al. v. Ruckelshaus et al.* (now Thomas), Cir. No. 84-1668 (D.C.N.J.), that the Secretary had failed to promulgate the assessment regulations in a timely fashion. In a consent order entered on February 5, 1985, the Secretary agreed to undertake

action to adopt the assessment regulations as expeditiously as possible. The Secretary agreed to the following:

(1) To publish a notice of proposed rulemaking for the "A regulations" on or before April 4, 1986, and to promulgate final "A regulations" on or before August 7, 1986.

(2) To publish a notice of proposed rulemaking for the "B regulations" on or before December 20, 1985, and to promulgate final "B regulations" on or before April 22, 1986.

The Department published a **Federal Register** notice on January 11, 1985, inviting updated public comment and suggesting meetings between interested members of the public and representatives of the Department involved in preparation of the regulations. Comments received in response to this notice and the earlier ANPRM's were discussed in the proposed rule.

The proposed rule was published on December 20, 1985 (50 FR 52126). The original comment period was set at 45 days in order to comply with the court-imposed deadlines cited earlier. The Department first extended the comment period to February 18 (51 FR 4397) and later to March 21, 1986 (51 FR 5376). On February 3, 1986, the court modified the previously-established deadlines. The modified schedule (51 FR 5376) required the Secretary to:

(1) Submit to the **Federal Register** the final type B regulations on or before June 23, 1986; and

(2) Propose for public comment the type A regulations on or before May 5, 1986, and submit the final type A regulations to the **Federal Register** by October 7, 1986, for publication.

This change in deadlines resulted largely from numerous requests for extension of time to provide public comment on the type B proposed rule and was agreed to by the parties to the litigation. Comments on the proposed type B regulations are discussed at length in section III of this preamble.

#### C. "Type A" Regulations

This final rule establishes the overall administrative process for conducting natural resource damage assessments and specifically provides the alternative methodologies referred to as the type B procedures described in section 301(c)(2)(B) of CERCLA. No guidance is provided in this rule regarding type A procedures or for choosing between a type A and a type B assessment.

The Department proposed initial type A procedures on May 5, 1986 (51 FR 16636). The procedures are applicable only to coastal and marine environments. At a later date, the

Department may expand these procedures or develop new systems to cover other ecosystems, natural resources, and different types of discharges and releases. Formulation of the type A procedures was dependent upon development of the concepts generally applicable to all natural resource damage assessments. As a result, the type A procedures have required more time to develop than the type B procedures. The proposed type A procedures are also proposing to amend certain procedural sections of this final rule. These proposed changes are to allow the type A procedures to be incorporated into the overall natural resource damage assessment process. These proposed changes will be incorporated as the type A regulations are issued in final form.

## II. Overview of the Rule

### A. Introduction

The final rule provides a process for determining proper compensation to the public for injury to natural resources. It stresses the need for a planned approach to natural resource damage assessments and allows active involvement of both the public and potentially responsible parties throughout the process. However, the final authority for all decisions in the assessment process rests with the authorized official. The rule seeks a balance between controlling the potential costs of assessments and the need for flexibility in designing the assessments. The rule also specifies the procedural steps to be taken in any natural resource damage assessment process performed pursuant to this rule.

Although the rule provides objectives and criteria for selecting methodologies for making injury and damage determinations, it does not provide specific procedures for implementing these methodologies. A flexible rule is necessary because of the multitude of resources, ecosystems, and oils and hazardous substances, as well as the need to allow the use of evolving scientific and economic methodologies. An evaluation of currently available techniques applicable to the various phases of a natural resource damage assessment is contained in various technical information documents. These technical documents are:

- Type B Technical Information Document: Injury to Fish and Wildlife Species;
- Type B Technical Information Document: Application of Air Models to Natural Resource Injury Assessment;



- Type B Technical Information Document: Guidance on Use of Habitat Evaluation Procedures and Suitability Index Models for CERCLA Application;

- Type B Technical Information Document: Approaches to the Assessment of Injury to Soil Arising from Discharges of Hazardous Substances and Oil; and

- Type B Technical Information Document: Techniques to Measure Damages to Natural Resources.

These technical information documents are being prepared in conjunction with this rule to ensure that the steps and objectives outlined in the rule are feasible and to provide more specific technical information to those performing assessments, interested members of the public, and potentially

responsible parties. These documents do not constitute regulatory guidance nor are they required to be followed to obtain the rebuttable presumption. The documents may be obtained through the CERCLA 301 Project office. Availability of these information documents in final form will be the subject of a future notice in the **Federal Register**.

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Chart I (continued)

Subpart E - TYPE B ASSESSMENTS

Determine whether an injury has occurred that is linked to CERCLA or CWA release (\$ 11.61: General)  
(\$ 11.62: Injury definition)  
(\$ 11.63: Pathway determination)  
(\$ 11.64: Testing and sampling methods)

Review of planned methodologies, especially Economic Methodology Determination, in light of results of Injury Determination phase (\$ 11.32(f): Assessment Plan)

CERCLA or CWA Injury  
Not Confirmed

End

Quantification of effects of discharge or release (\$ 11.70: General)

(\$ 11.71: Service reduction quantification)  
(\$ 11.72: Baseline services determination)  
(\$ 11.73: Resource recoverability analysis)

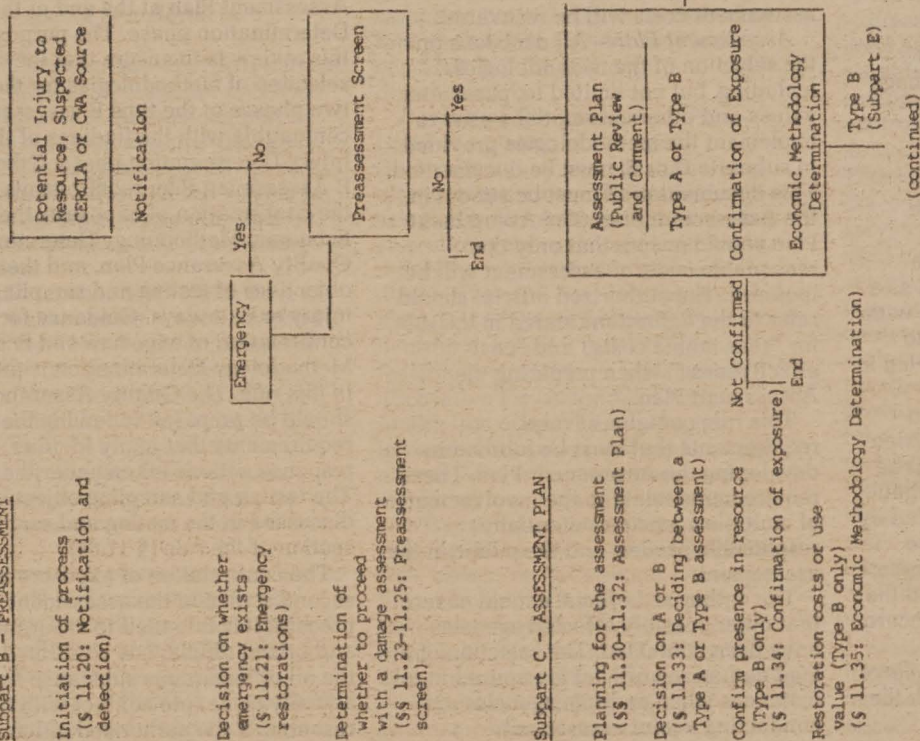
Estimate of diminution of value or restoration or replacement costs (\$ 11.80: General)

(\$ 11.81: Restoration methodology)  
(\$ 11.82: Restoration Methodology Plan: Public Review and Comment)  
(\$ 11.83: Use value methodologies)  
(\$ 11.84: Implementation guidance)

Subpart F - POST-ASSESSMENT

(\$ 11.90: Report of Assessment)  
(\$ 11.91: Demand)  
(\$ 11.92: Restoration account)

(\$ 11.93: Restoration Plan:



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### B. The Natural Resource Damage Assessment Process

Chart I provides an overview of the natural resource damage assessment process embodied in the rule. This section will briefly discuss the major steps in the process. A more detailed discussion of the major issues pertaining to this process is contained in Sections C and D of this overview of the rule.

**Initiation of Process**—A natural resource damage assessment begins with the process set forth in the NCP. The NCP, in 40 CFR 300.52(d) and 300.62(d), provides for notification by the lead agency to Federal or State agencies authorized to act as trustees when a potential natural resource injury may exist. In instances where a Federal or State official first identifies a possible injury to a resource for which a Federal or State agency may act as a trustee under CERCLA, and suspects a CERCLA or CWA covered discharge or release as the source, the official is directed to the procedures in the NCP for reporting the discharge or release.

**Emergency Restorations**—Section 111(i) of CERCLA provides authority for emergency restorations. The rule: defines an emergency; requires that the emergency be reported to the National Response Center; allows for certain emergency actions to be taken in the event the lead response agency or potentially responsible party is not taking sufficient action; and upon completion of the emergency restoration, returns the authorized official to the natural resource damage assessment process.

**Preassessment Screen**—Any assessment actions, other than emergency actions, begin with a preassessment screen to determine whether the discharge or release justifies a natural resource damage assessment. This screen is viewed as a "desk top" review of existing data with a minimal amount of field work and should be capable of being completed in a matter of days.

A determination is required upon completion of this screen. The decision to proceed beyond this screen must be based upon a preliminary finding that: the discharge or release was covered by CERCLA or the CWA; it could have resulted in some injury to the resource; the resource potentially injured and the extent of potential injury are of concern to the authorized official; and the authorized official has reason to believe that the potential benefits outweigh the potential costs of performing an assessment.

The preassessment screen proceeds in steps from preliminary identification of

the substance discharged or released and its source, to initial estimates of the pathway for purposes of identifying any resources that may be impacted, to identifying important resources that may justify further assessment. This preassessment screen should complement rather than duplicate any equivalent procedure that may already be used by Federal and State agencies to screen for potential resource damages. It should permit the authorized official, based upon previous agency experience or similar incidents involving such resources, to begin the process of identifying and deriving cost estimates on a very preliminary basis. It should not duplicate or repeat information gathered by the lead agency or by other parties as part of the response action. Existing and previously gathered information is sufficient so long as it is adequate to make the appropriate determinations. Moreover, in conducting assessments pursuant to this rule, all activities of the authorized official should be closely coordinated with the lead agency undertaking response work. If the preassessment screen results in a determination that a natural resource damage assessment is appropriate, the next phase is to prepare an Assessment Plan. However, if the preassessment screen results in a determination that a natural resource damage assessment is not appropriate, no further assessment actions are to be taken and no assessment costs will be recovered.

**Assessment Plan**—All decisions on the selection of the methodologies, including, but not limited to, parameter values and other assumptions used to implement the methodologies provided in subparts D or E, must be documented. This documentation must be set out in the Assessment Plan. The Assessment Plan should ensure that only the reasonable costs of assessment will be incurred. The authorized official should refer to the definitions stated in the rule for "reasonable costs" and "cost-effectiveness" when preparing the Assessment Plan.

This rule contains several requirements that must be fulfilled in developing the Assessment Plan. These requirements relate to the involvement of multiple agencies, potentially responsible parties, and the public in the assessment.

The authorized official should ensure that other possibly affected agencies have been contacted. The selection of a lead authorized official is required in all instances when multiple agencies are conducting a joint assessment.

Allowances are made for assessments that can be divided and conducted separately. Divisions of responsibility

among agencies jointly conducting an assessment should be documented in the Assessment Plan. The rule provides a division of responsibility in instances where consensus cannot be reached. Agencies should be aware of additional requirements concerning designation of lead trustees in claims against the Hazardous Substance Response Trust Fund (CERCLA Fund) contained in 40 CFR 306.20(b). In claims against the CERCLA Fund, 40 CFR 306.20(b) states, "Should the trustees fail to agree on a lead trustee, EPA in its sole discretion shall appoint a lead trustee for the purposes of asserting a claim against the Fund on behalf of all trustees."

The potentially responsible parties should be identified at this phase. The rule provides for a Notice of Intent to Perform an Assessment to be sent to any identified potentially responsible parties.

The rule provides for public involvement in the Assessment Plan with at least a 30-day review and comment period before implementing the Plan or making significant modifications. The rule also requires that comments and responses be maintained as part of the administrative process.

For a type B assessment, there are several additional requirements in the Assessment Plan phase. The rule provides for a mandatory review of the Assessment Plan at the end of the Injury Determination phase. The purpose of this review is to ensure that the selection of methodologies for the last two phases of the type B assessment is compatible with the findings of the Injury Determination phase. Other type B Assessment Plan requirements include the confirmation of exposure, the Economic Methodology Determination, a Quality Assurance Plan, and the objectives of testing and sampling for injury or pathways. Guidance for the confirmation of exposure and Economic Methodology Determination is provided in this rule. The Quality Assurance Plan should be prepared following the same requirements that apply to other response actions taken under the NCP. The testing and sampling objectives are discussed in the testing and sampling section of the rule (§ 11.64).

The confirmation of exposure is the second screen in the assessment process. It is intended to ensure that the authorized official has confirmed that the oil or hazardous substance has actually come into contact with the resource. If the authorized official cannot confirm that the oil or hazardous substance has actually come into contact with the resource, no further



assessment actions are to be taken and no assessment costs will be recovered.

**The Economic Methodology Determination** is where the authorized official must make a choice between using: restoration or replacement costs; or the diminution of use values as the measure of damages. The decision will affect the choice of methodologies to be selected in the Quantification phase and to a lesser extent in the Injury Determination phase. Therefore, the rule requires the decision at an early stage, but provides that the decision may be modified. Using "off-the-shelf" data, the Economic Methodology Determination requires an "order of magnitude" estimate of the relative costs and benefits of restoration or replacement versus the diminution of use. The guidance on performing this determination is described within the rule.

The selection of: restoration or replacement costs; or the diminution of use values only affects the method of damage determination. It does not imply any decisions concerning whether the resources will be restored. In fact, the rule requires that all funds, regardless of whether the basis of calculating the damage was restoration costs or diminution of use, be used for restoration, rehabilitation, replacement, or acquisition of the equivalent. In restoration or replacement, the costs can include the diminution of use values until the resource is restored or replaced.

**Type B Assessment**—A type B natural resource damage assessment involves three major steps: establishing that an injury has occurred and that the injury resulted from the discharge or release; quantifying the effects of the discharge or release on the services provided by the injured resource; and determining the damage.

**Injury Determination**—This phase of the type B assessment acts as the third screen of the natural resource damage assessment. To assert a natural resource damage claim, the authorized official must establish that an injury occurred and must link that injury to the discharge or release. Otherwise, no further assessment actions are to be taken and no assessment costs will be recovered.

To perform this phase, injury to one or more natural resources must first be established. The rule provides a general definition of injury as a measurable adverse change in the chemical or physical quality or viability of a natural resource. For example, an organism need not die before that organism is considered to have been injured by the oil or hazardous substance. Conversely,

the mere presence of oil or a hazardous substance in the organism may not necessarily constitute an injury. All of the natural resources specified by CERCLA have been placed into one of five groups: surface water, ground water, air, geologic, and biological resources. Specific definitions of injury are provided for each of these resources. These specific definitions focus on inherent physical, chemical, or biological properties of the resource that enable it to provide one or more specific services, such as habitat for aquatic species or a water supply.

In addition to satisfying the injury definition, the pathway of the discharged or released substance from the source to the resource must be demonstrated. Each of the five groups of resources may also act as a component of the pathway through which the oil or hazardous substance may travel. For example, biological resources can carry the substance away from the site by either direct physical contact or by exposing other organisms through the food chain. Oil or hazardous substances contained in ground water resources may move to a lake or stream thereby exposing biological resources. The use of transport and fate modeling in media such as air or water may be useful in many situations for demonstrating the pathway. In other situations, sampling may be required. The rule also provides guidance on selecting testing and sampling methodologies to determine that an injury to the resource has occurred and for pathway determinations.

**Review of the Assessment Plan**—Upon completion of the Injury Determination phase, the authorized official must review the methodologies selected in the Assessment Plan. This step allows the authorized official to refine the restoration or replacement alternatives and cost estimates initially identified in the Assessment Plan phase in order to select a cost-effective, feasible restoration or replacement alternative for comparison with diminution of use. The distinction between restoration and replacement alternatives will, in most cases, depend on the nature of the lost or disrupted services previously provided by the resource. If an injury, as defined in the rule, cannot be determined or cannot be linked to the discharge or release, further assessment efforts should be terminated and the results of the Injury Determination phase documented in the Assessment Plan. If an injury determination has been made, methodologies for the next two phases must be selected that are consistent with the findings of the Injury

Determination. If the decision was not previously made, the authorized official must decide whether: restoration or replacement costs; or a diminution of use values will form the basis of the damage determination. The rule provides that when significant modifications occur to the Assessment Plan, these modifications shall be made available for public review and comment.

**Quantification of Effects**—Having established that the resource was injured by the discharge or release, the next step in the type B procedure is to quantify the effects on the injured resource.

Because the purpose of the natural resource damage assessment is to determine compensation for injuries rather than a decision on the level of cleanup, this phase requires ascertaining the baseline level of the services provided by the resource prior to the discharge or release. The baseline level of services is then compared to the existing level of services or the anticipated level of services upon the completion of any response actions to determine the residual change resulting from the discharge or release. The baseline level of services should include consideration of the resource's natural cyclical changes.

This rule provides that quantification of the change in the resource be expressed in terms of the change in the level of services that the resource provides. These services include such ecological services as flood and erosion control, habitat, and food chains as well as such human uses as recreation. Therefore, it is at this stage in the assessment that the selection is made of services that in a later phase will be used to determine damages. The selection of the services to be assessed may vary based upon the economic methodology selected. For restoration or replacement, the authorized official has the discretion to select services provided prior to the discharge or release by the resource to humans and to other natural resources. For a diminution of use value, the authorized official should select services for which clear relationships to human uses existed prior to the discharge or release and for which dollar values can be assigned.

**Damage Determination Phase**—The next phase of the process is applying the method of estimating the damage, using either the costs of restoration or replacement or the diminution of use values, that was determined in the Assessment Plan.



If restoration or replacement costs are to be the measure of damages, a plan for the restoration or replacement, referred to as the Restoration Methodology Plan, must be developed in the Damage Determination phase. This plan must be in sufficient detail to ensure that all major elements of costs are included and that these costs represent the most cost-effective means of restoring or replacing the services lost. This means that the authorized official should take considerable effort to detail the costs of the specific restoration or replacement actions selected, building wherever appropriate upon remedial action data available for CERCLA response actions. This plan will also serve as the foundation for the final restoration plan that must be developed after the damage award.

Using the diminution in use values as the method for determining damages will require that the authorized official identify the human uses of the services that were lost as a result of the discharge or release. For an assessment based upon the diminution in use values, the lost uses being valued are the committed uses supplied by the injured resources. Committed uses must be current public uses or public uses that have been financially, legally, or administratively documented.

The losses compensable to a Federal or State agency acting as a trustee under CERCLA are for the uses of the resource by members of the public at large. They do not include any direct or indirect losses suffered by a private commercial user of public resources. Direct private commercial losses appropriately are not recovered by a public body acting for the public at large.

The rule provides guidance on performing a damage determination using either the restoration or replacement cost method or the diminution of use value method. A final section in this portion of the rule provides guidance, such as selecting a discount rate, that is applicable to either method.

**Report of Assessment**—At the conclusion of either a type A or a type B assessment, the authorized official must document the results of the major steps of the process. This documentation includes the Preassessment Screen Determination and the Assessment Plan, with all comments and responses, for either the type A or type B assessment. The results of the assessment should be included for the type A assessment. For the type B assessment, the Injury Determination, the Quantification and the Damage Determination, including the Restoration Methodology Plan if appropriate, should be included. This

document must be filed as the Report of Assessment with a court or an administrative body should the Federal agency seek a rebuttable presumption.

**Post Assessment**—CERCLA requires that funds recovered for damages must be available for restoration, rehabilitation, replacement, or the acquisition of the equivalent of the injured resource. To accomplish this objective, the rule requires the establishment of an account into which all monies awarded pursuant to section 107 of CERCLA or section 311(f) (4) and (5) of the CWA for compensation for damages must be placed. For Federal authorized officials acting as trustees, this account shall be located in the United States Treasury. State authorized officials acting as trustees are given the choice of setting up an account in the State treasury or having the potentially responsible party set up a trust fund. The purpose of these procedures is to ensure that monies obtained for restoration will be available for that use without requiring, with one exception discussed below, that the Federal or State agency go through the normal appropriations process.

Reimbursements of assessment and administrative costs are not placed in these accounts. Similarly, monies awarded from the Hazardous Substance Response Trust Fund as reimbursement for assessment or restoration costs pursuant to the natural resource claims provision of CERCLA need not be placed in a post-assessment account because they are by definition reimbursements of costs incurred. Claims against the Hazardous Substance Response Trust Fund must be costs incurred as specified by the Natural Resource Claims Procedures promulgated by EPA (40 CFR Part 306). These reimbursements must be returned to the Federal or State general treasury that incurred the costs.

Once a damage award is made, the Federal or State agency acting as trustee shall prepare a Restoration Plan. This plan shall be based upon the decisions made in the Restoration Methodology Plan, if one has been prepared, modified to the extent necessary to accommodate new information, including the amount of the award. Where the measure of damages is determined using a use value methodology, the Restoration Plan shall describe those management actions designed to restore, replace, rehabilitate, or acquire the equivalent resources that can be undertaken consistent with the level of the damage award. The accounts described above are to be used to pay for the implementation of this Restoration Plan.

In recognition of the fact that restoration of some injured resources is technically infeasible, replacement and acquisition of the equivalent are defined to include acquisition of resources that provide similar services to the injured resource. However, there is a limitation on use of the account. Where the Restoration Plan would involve acquisition of land for Federal management, the award must be paid to the general treasury. The appropriations process must be used where private land is being acquired that would expand the total Federal landholdings.

### C. Concepts Embodied in the Rule

#### 1. Compensatory, Not Punitive

The rule takes into consideration existing common law rules for developing a theory of natural resource damages. A fundamental principle of the theory developed in the rule is that natural resource damages are compensatory, not punitive. CERCLA itself calls for compensatory rather than punitive damages. This principle is consistent with the common law, which disfavors punitive damages, and is basic to the theory underlying the common law of damages, which is that money can be used to provide substitutionary relief.

The money awarded as compensation using common law principles represents a rough measure that approximately represents the value of the thing that is lost. Rules have been developed by the courts for the measurement of damages so that cases can be resolved, and perhaps more importantly, settled in accordance with common law principles. Settlements become possible because the range of outcomes given a particular set of facts is predictable.

The mandate to establish regulations for the assessment of damages to natural resources included a mandate to develop methodologies that are based upon the best available procedures. This directive implies that compensatory damages were intended. The expensive and complex process of studying existing injury measurement and economic compensation techniques would have been unnecessary if punitive damages were intended. The procedures for determining punitive damages could have involved the simple publication of penalty fee tables.

Finally, it should be noted that a variety of criminal or other punitive statutes may apply to actions for which natural resource damages may be sought. Through those statutes, penalties may be sought where appropriate.



## 2. Rebuttable Presumption

CERCLA provides for the recovery of damages to natural resources, but it does not establish the measure of those damages. Instead, it requires the President, acting through designated Federal officials, to develop regulations for the assessment of damages. Pursuant to CERCLA section 111(h), the dollar figure representing the measure of damages is determined through an assessment performed using the procedures specified in the rule. This figure, when supported by the Report of Assessment and based on an assessment performed by a Federal official, is entitled to a rebuttable presumption in a court action or administrative proceeding to determine the measure of damages recoverable under the statute. The rebuttable presumption provides a significant benefit. Accordingly, the methodologies and criteria adopted in the rule have been carefully selected.

In its present form, the rebuttable presumption accorded by section 111(h)(2) of CERCLA attaches only to assessments performed by Federal officials. The question of the interpretation of the rebuttable presumption provision in CERCLA arose prior to the formulation of this rule in the context of the Natural Resource Claims Procedures, 40 CFR 306, promulgated by EPA. A full discussion of the resolution of this issue is contained in section V(C) of the preamble to that final rule (December 13, 1985, 50 FR 51212) for the Natural Resource Claims Procedures. In brief, after reviewing comments and considering revisions to the NCP, EPA concluded that the language of section 111(h)(2) of CERCLA, when read in conjunction with section 111(h)(1) of CERCLA, which refers only to "damages . . . assessed by Federal officials," only allowed the provision of the rebuttable presumption to be extended to Federal officials. The Department of the Interior has adopted a position on this issue that is consistent with the Executive branch's prior decision on the interpretation of CERCLA in this matter.

The Department notes that claims against the Hazardous Substance Response Trust Fund must be for costs incurred as specified by the procedures promulgated by EPA at 40 CFR 306 (December 13, 1985, 50 FR 51205). As mentioned in the EPA preamble, it may be possible for Federal and State trustees to work jointly on assessments done pursuant to this rule. The results of these joint assessments may then qualify for a rebuttable presumption.

## 3. Relationship to Response Actions

An action for the recovery of damages to natural resources is part of the larger statutory scheme of CERCLA and the CWA. Under those Acts discharges of oil and releases of hazardous substances are responded to by EPA and the U.S. Coast Guard in accordance with procedures set forth in the National Contingency Plan (NCP). In some cases, responses are also made by States or other Federal agencies. The primary purpose of response actions is to protect human health. This rule supplements the procedures in the NCP. It does not replace response actions, but adds an additional means of addressing problems resulting from discharges of oil and releases of hazardous substances. In addition to taking removal and remedial actions, compensation may be sought and resources restored by use of the procedures in this rule.

Injuries to natural resources should be considered in the planning of a response by the EPA or the U.S. Coast Guard. In particular, natural resource concerns should be included in the planning process for remedial action. However, in many cases, not all natural resource concerns will be resolved by that process alone. In some cases certain actions, such as habitat management or acquisition of an equivalent resource, will be beyond the scope of the response action. This rule provides that natural resource damages are for injuries residual to those injuries that may be ameliorated in the response action. In addition, these damages include compensation for the loss of use from the time of the discharge or release until such injuries are ameliorated. This concept of natural resource damages as a residual should prevent the development of two separate actions to ameliorate the same situation, encourage the inclusion of natural resource concerns in the development of remedial plans, and preserve the priority order of remedial actions intended by the creation of the National Priorities List.

In some instances it may be necessary to anticipate an eventual remedial action in planning a natural resource damage assessment. Ideally the natural resource damage assessment would be performed concurrently with the remedial investigation/feasibility study (RI/FS). When the statute of limitations will not allow adequate time to complete and coordinate the necessary procedures, the rule does not preclude filing of a natural resource damage claim against a responsible party before completion of the assessment.

## 4. Cost-Effectiveness and Reasonable Costs

Cost-effectiveness is defined in the rule as achieving an objective with the least expenditure of financial or other assets. Thus, in order to achieve cost-effectiveness, a well-defined objective must be specified. For example, the objective of restoration or replacement is the return to the baseline level of services provided by the resource. Once an objective is defined, cost-effectiveness means that the authorized official must choose the least expensive management or other actions that achieve the objective.

The Department recognizes that in many instances limited information may be available to prepare an Assessment Plan. The rule is flexible enough to allow for revision of the Assessment Plan. What may have been cost-effective under the previous set of circumstances may not be cost-effective when new information is obtained. Therefore, the plan should be modified during the assessment as new information is obtained. In this context, the test of cost-effectiveness may require consideration of new management or other actions as objectives become clearer and more specific.

Section 107(a)(4)(C) of CERCLA states that a responsible party is liable for the "reasonable costs of assessing" injury. The concept of reasonable cost implies cost-effectiveness, but the term reasonable cost is broader in scope. Cost-effectiveness means that whenever the same or similar benefit can be obtained in several ways, the least costly means of obtaining that benefit is selected. The concept of reasonable cost is more closely related to the economic notion of cost-benefit analysis. Reasonable cost, while incorporating cost-effectiveness, also allows comparisons to be made across choices of procedures involving very different levels of benefits. A cost-effectiveness criterion cannot be used as a measure to select between alternatives that provide very different levels of benefits at different costs. A reasonable cost criterion should be used for this purpose.

The Department has defined the term "reasonable cost," for the purposes of this rule, to mean: that the Injury, Quantification, and Damage Determination phases of the Assessment Plan have a well-defined relationship to each other; that the anticipated increment of extra benefits in terms of the precision or accuracy of estimates obtained by using a more costly



methodology for injury, quantification, or damage determination outweigh the anticipated increment of extra costs of the more expensive procedure; and that the anticipated costs of performing the assessment are expected to be less than the anticipated damage amount.

In order to achieve the objective of deriving a dollar figure to be used as the amount of damage claimed, a three-phased assessment must be performed to: document the occurrence of an injury; quantify the effects of the injury; and determine damages. In almost all cases, the achievement of reasonable costs will require that these three phases be planned concurrently. Since these three phases will form the basis of a damage claim, all analyses conducted under this rule should be directed toward the goal of obtaining a dollar value for the injury to the resource. The minimum amount of information required to move from one phase to another should be collected. During an assessment, studies of injury or damage that do not directly contribute to the determination of a dollar value for the injured resource should not be part of the damage claim. However, nothing in this rule precludes agencies from performing general or related studies with their own funds.

#### 5. Involvement of the Public and Potentially Responsible Parties

The rule uses an administrative process as its decisionmaking method. Various methods exist for doing a natural resource damage assessment. No single answer can be given for the various questions that arise in the process. Every resource and affected area has distinctive characteristics and is managed by different agencies for different purposes. Accordingly, the flexibility of an administrative process is desirable and fair, giving the public and responsible parties protection against arbitrary requirements. The rule requires that an Assessment Plan be prepared before an assessment is initiated. After the plan is prepared, there is a period of at least thirty days during which the public and any potentially responsible parties are to be given an opportunity to review and comment on the plan. If a Restoration Methodology Plan is prepared, comment and review by the potentially responsible party and the public are also required for at least thirty days. All comments on both the Assessment Plan and the Restoration Methodology Plan are included in the Report of Assessment, which is part of the administrative record. Therefore, the views of the public and any potentially responsible parties on the key elements

of the assessment will be available in any subsequent litigation.

Public involvement and participation by the potentially responsible party will aid the authorized official seeking natural resource damages in a number of ways. First, it will ensure that important resource concerns are not omitted from the assessment. Second, it will help ensure that the methodologies are given an independent review and that the appropriate methodologies are chosen for the Assessment Plan. Third, it will help ensure that the costs of assessment are reasonable.

Early involvement of the potentially responsible party is intended to facilitate fair and speedy resolution of damage actions. Just as the NCP process encourages responsible parties to undertake remedial actions and avoid litigation, this process is intended to encourage responsible parties to undertake natural resource damage assessments and restorations. If the responsible party is aware of the proposed assessment efforts, it may be encouraged to take the actions necessary to do the assessment and restoration. However, the Federal or State authorized official is the ultimate decisionmaker regarding the content of the Assessment Plan, as well as all restoration actions.

#### 6. Emergencies

In accordance with section 111(i) of CERCLA, the rule permits an emergency restoration prior to development of an Assessment Plan where genuine emergency circumstances exist. Some limited situations may require immediate action in order to avoid irreversible loss or to prevent or reduce any continuing danger to natural resources (e.g., where a continuing discharge or release must be abated in order to avoid the complete destruction of a resource or where continuing degradation threatens more and more of the resource). Such emergency actions would typically consist of the erection of non-permanent barriers to prevent or reduce the migration of the oil or hazardous substance onto or into the resource. The authorized official may undertake only those actions necessary to abate the emergency. Any additional actions other than those necessary may be performed only upon following normal assessment procedures.

Emergency actions may only be taken on lands or waters over which the authorized official has existing authority to act. This provision is not an authorization to undertake response actions on private property nor is it meant as a substitute for response actions. For example, if the discharge or

the release occurs in an area for which the agency would not otherwise have authority to act, emergency restoration actions are limited to those actions that would prevent or reduce the migration of the oil or hazardous substance onto or into the resource under their authority.

If the discharge or release occurs in an area for which the agency would have the authority to act, the authorized official should first consider using that existing authority to undertake response actions to abate the emergency. The cost of such response actions would be recoverable under section 107 (a) or (b) of CERCLA, rather than as natural resource damages. The burden of proof, based upon information available at the time, that irreversible harm would have resulted if the emergency restoration were not undertaken and that costs associated with the emergency actions were reasonable and necessary will rest with the Federal or State agency acting as trustee.

#### D. Resource Related Issues

##### 1. Injury Determination—General

The definition of injury adopted in this rule is fundamental to the assessment process. Without injury to one or more natural resources there is no damage to recover. A general definition of injury is provided in § 11.14(v). The rule clearly distinguishes between the concepts of "damage" and "injury." Following the statutory division in use of the words, "damage" is the amount of money sought in compensation for an "injury." Injury is the "injury to," "destruction of," or "loss of" the resource.

The injury definition has two parts. First, there must be a measurable adverse change in the resource. That is, there must be a change for the worse, in the resource that is detectable by observation or scientific methods. Specific definitions of injury are provided for each resource in § 11.62. The criteria for what constitutes a measurable injury are strict. This stringency reflects the determination by the Department that these criteria provide for the best available procedures and reflect the fact that Federal trustees will receive a rebuttable presumption for assessments performed pursuant to this rule. By establishing acceptance criteria for the measurement methodologies for the injuries to the resources, the rule requires that the authorized official use only quality evidence in measuring the adverse change in a resource.



Second, the adverse change must be to the chemical or physical quality or in the viability of a resource. Since only biological resources involve the aspect of viability, specific criteria for measuring such injury is based on a measurable biological response of the organism. Water and air, for instance, are commonly evaluated in terms of established water quality or air quality standards. Such standards have not been established for biological resources to determine when exposure to a specific contaminant level has reduced the viability of the different organisms. Further, no standards have been established for biological resources adversely impacted by residues of specific contaminants resulting from such exposure.

Finally, to be compensable under CERCLA or the CWA, the injury must result from a discharge of oil or release of a hazardous substance, or from a product of reactions resulting from the discharge of oil or release of a hazardous substance. This result is established by the demonstration of a link between the discharge or release and the injured resources, called the pathway determination as provided in § 11.63.

## 2. Injury Determination for Specific Resources

(a) *Surface water.* The presence of oil or hazardous substances in surface waters may adversely affect the quality of the resource, especially its ability to provide essential life-supporting services. The definitions of injury to the surface water resource rely primarily upon established water standards and criteria, recognizing the extensive research performed to develop the standards and criteria. The injury definitions include concentrations of substances adhering to sediments in contact with the surface water, because these sediments provide services to aquatic life much as soils provide on land. The injury definitions do not differentiate between freshwater and seawater, except as may be provided by the specific standards and criteria used, because CERCLA and the CWA broadly define the "waters of the United States" to include both fresh and marine surface waters.

(b) *Ground water.* The presence of oil or hazardous substances in ground water may adversely affect the quality of the resource, especially its services to humans. The definitions of injury to the ground water resource therefore rely upon established water standards and criteria. The term "ground water" is defined in both CERCLA and the CWA, and the definitions do not include water

or other materials in the unsaturated zone. Therefore, measures of adverse change in the ground water resource resulting directly from the occurrence of oil or hazardous substances in the unsaturated zone are included in the subsection on geologic resources rather than in this subsection. Although many of the standards and criteria used are only applicable to fresh ground water, injury to brackish or saline ground water may occur if the ground water contains released substances that have caused injury to other resources.

(c) *Air.* Injury to air is defined in two basic ways. The first relies upon air quality standards set by EPA and upon related standards set by individual States. Those standards include within them ways of determining whether they have been violated, including duration and appropriate testing procedures. As a result, these criteria are not repeated in this rule. Secondly, the number of substances for which air quality standards have been set is relatively small, so air may also be considered injured if an airborne oil or hazardous substance injures other resources. (Note that the definition of "oil" is broad and includes gaseous or vaporized oil products and components.) Additional information helpful for assessing injury to air is being developed in: "Type B Technical Information Document: Application of Air Models to Natural Resource Injury Assessment," which is being prepared in conjunction with this rule.

(d) *Geologic resources.* Geologic resources include the portion of the Earth's crust not otherwise included in ground and surface water, and includes such elements as soil, sediments, rocks, and minerals. The quality of geologic resources is defined by physical and chemical characteristics that pertain to the major services provided by the resource. Soil quality is frequently measured by its ability to support plants and other organisms. Thus, injury to soil is defined directly by chemical and physical criteria and through its ability to continue to support biological organisms. Development potential is especially important for mineral resources, so if a discharge or release reduces that potential, the minerals are considered injured. The unsaturated zone is included within geologic resources. However, its major effect is on ground water. Therefore, injury to the unsaturated zone also can be based upon its effect on ground water.

Finally, as with all of the other resources, provision is made for considering the geologic resource injured if concentrations sufficient to

cause injury to other resources are found. This provision allows for cases where previously established standards may not anticipate effects of oil or a hazardous substance on these resources. Additional information helpful for assessing injury to soil is being developed in the "Type B Technical Information Document: Approaches to the Assessment of Injury to Soil Arising from Discharges of Hazardous Substances and Oil," which is being prepared in conjunction with the rule.

(e) *Biological resources.* Section 11.62 also provides criteria for demonstrating injury to organisms when their viability is adversely impacted by oil or a hazardous substance, as well as a limited use of established standards for edibility. Because specific criteria have not been developed previously for biological resources, more detail is provided than for other resources. Additional technical information is being developed in the "Type B Technical Information Document: Injury to Fish and Wildlife Species," which is being prepared in conjunction with this rule.

In general, injury will have occurred to a biological resource when a biological response, as defined in the rule, has resulted from exposure to the oil or hazardous substance. The rule provides acceptance criteria for determining which biological responses may be used in such a demonstration, provides a list of certain responses in fish and wildlife species that have been determined acceptable according to those criteria, and also provides acceptable measures for those identified responses.

Except for the use of edibility action or tolerance levels set by the Food and Drug Administration and by States, the mere presence of a substance in an organism does not necessarily constitute injury to the organism. Many organisms, including man, can carry low levels of foreign chemicals in their tissues with few or no known measurable effects from those chemicals. Injury determination in this rule is based on a demonstrable adverse biological response from the oil or hazardous substance. For example, DDT and related chemicals are ubiquitous in small amounts in almost every warm-blooded animal, but this fact alone does not show injury. DDT, however, can cause eggshell thinning. This biological response has been an important factor in causing population declines of certain fish-eating and raptorial birds. Demonstration of statistically significant levels of eggshell thinning in the presence of DDT does demonstrate



injury. Many similar biological responses are described in the rule.

Acceptance criteria in the rule provide the means for evaluating whether a particular response will demonstrate injury in a specific case. These acceptance criteria extensively broaden past practice under which many assessments relied almost exclusively on body counts of dead organisms as the primary or sole evidence of injury to those organisms and did not allow the use of compensation for other kinds of biological responses, such as sublethal effects like eggshell thinning. These acceptance criteria can be summarized as requiring that the response is unlikely to be due to factors other than the exposure to oil or hazardous substances, the response has been demonstrated in both the laboratory and the field, and that testing for the response is practical and reliable. Both laboratory and field demonstrations are required because these two conditions can rarely provide the same information. Laboratory experiments can be carefully controlled to prevent effects from factors other than the substance under test, but may use concentrations, exposure systems, and other conditions unrelated to those found in the field. Controlled laboratory experiments cannot duplicate the variety of foods, activities, potential substance degradation, and other factors found in the field. Field experiments or observations often rely on correlations, and cause-and-effect can rarely be documented as well as it can be in the laboratory. There are numerous instances where either laboratory or field experiments have failed to confirm conclusions drawn from the other.

Categories of such responses are provided in this rule, and certain responses within these categories have been identified for fish and wildlife species as having met the acceptance criteria. These specific responses are identified based upon a review contained in the type B technical information document cited above, and pertain to fish and wildlife. The acceptance criteria are intended to be applied to responses in all biological resources, including plants, shellfish, and other organisms. The authorized official may rely upon other responses in addition to the specific responses identified in the rule, so long as the other responses relied upon can meet the acceptance criteria. There has been considerable work on responses in other organisms, especially plants, therefore, other responses should meet the acceptance criteria. On the other hand, if extensive new research work is

required to meet the acceptance criteria, the costs of such research would be outside the assessment costs attributable to a particular assessment for purposes of a damage claim.

### 3. Pathways

For injury to have occurred, the oil or hazardous substance must have traveled from the source of the discharge or release to the injured resource. In some cases demonstration of this fact is straightforward, but in others further work must be done. In general, two ways may be used: demonstration of sufficient concentrations in the pathway for it to have carried the substance to the injured resource; or use of modeling to demonstrate the pathway. In each case, a given resource may act as a pathway, be injured, or both. Pathways can and often do include more than one resource category.

For the physical resources, including water, air, and the geologic resources, the rule identifies important factors and standard procedures appropriate to making a pathway determination.

Biological resources may act as a pathway both by direct physical contact or by assimilation through a food chain. Physical contact usually includes material on the skin, fur, feathers, or other surface covering. Food chain transfers may include bioaccumulation and bioconcentration, so that an organism higher on a food chain may contain the highest concentrations of the substances. Food chains may be analyzed by testing free-ranging organisms or by placing test organisms in situ to discover whether they will take up the substance. The use of appropriate indicator species is recommended. Further discussion of the use of indicator species may be found in the "Field Operations Manual for Resource Contaminant Assessment—Chapter 1.5—Field Methods and Materials," available from the Division of Resource Contaminants Assessment, U.S. Fish and Wildlife Service, Department of the Interior, 1801 "C" St. NW., Washington, DC 20240.

Careful selection of indicator species will consider the potential for that species to have taken up or contacted the discharge or release. Plants often can exclude or selectively screen out non-essential substances present in their environment, especially many organic compounds with large molecules. Other substances, such as small inorganic ions, may be taken up in the plant tissues and passed on to other organisms. Animals, because of their mobility and different physiology, are often more likely to serve as pathways, especially over greater distances.

### 4. Testing and Sampling

Section 11.64 provides guidance on selecting procedures and techniques to be used by the authorized official in making injury and pathway determinations. For the most part, the guidance refers to techniques that are standard for each discipline, and the identification here primarily provides special considerations that may be needed in using these otherwise standard techniques for assessment purposes.

(a) *Surface water and ground water*. Specific techniques for testing and sampling of water resources are not identified in § 11.64 of the rule. The authorized official may select appropriate techniques for inclusion in the Assessment Plan from the following references:

- American Public Health Association, American Water Works Association, and Water Pollution Control Federation, "Standard Methods for the Examination of Water and Waste-water," 16th edition, Washington, DC, 1985. Available from: American Public Health Association, Attn: Publications Sales, 1015 15th Street, NW, Washington, DC 20005; ph: (202) 789-5600.
- Barcelona, M.J., L.P. Gibb, and R.A. Miller, "A Guide to the Selection of Materials for Monitoring Well Construction and Ground-Water Sampling," Illinois State Water Survey, Champaign, IL, SWS Report No. 327, 1983. Available from: Publications, Water Survey Resource Center, 2204 Griffith Drive, Champaign, IL 61820; ph: (217) 333-2210.
- Claassen, H.C., "Guidelines and Techniques for Obtaining Water Samples that Accurately Represent the Water Chemistry of an Aquifer," U.S. Geological Survey, Lakewood, CO, Open-File Report No. 82-1024, 1982. Available from: Open File Services Section, Western Distribution Branch, U.S. Geological Survey, Box 24325, Federal Center, Lakewood, CO 80225; ph: (303) 234-5888.
- Gillham, R.W., M.J.L. Robin, J.F. Barker, and J.A. Cherry, "Groundwater Monitoring and Sample Bias," American Petroleum Institute, Washington, DC, API Publication No. 4367, 1983. Available from: American Petroleum Institute, 1220 L Street, NW, Washington, DC 20005; ph: (202) 682-8000.
- Grasshoff, K., M. Ehrhardt, and K. Kremling (eds.), "Methods of Seawater Analysis," 2nd edition, Verlag Chemie, Weinheim, Federal Republic of Germany, 1983. Available from: VCH Publishers Inc., 303 NW 12th Ave., Deerfield Beach, FL 33222-1705; ISN No. 089573-070-7; ph: (305) 428-5566.
- "Ground Water and Wells," Johnson Division, St. Paul, MN, 1985. Available from: Johnson Division, P.O. Box 64118, St. Paul, MN 55164; ph: (612) 636-3900.
- "Guidelines Establishing Test Procedures for the Analysis of Pollutants," 40 CFR Part 136.
- "Pesticide Chemicals: Subpart D—Test Methods for Nonconventional Pesticide Pollutants," 40 CFR 455.50-.51.



Strickland, J.D.H., and T.R. Parsons, "A Practical Handbook of Seawater Analysis," 2nd ed., jointly published by the Fisheries Research Board of Canada and Supply and Services Canada, Ottawa, Canada, 1984. Available from: Unipub, 205 E. 42nd Street, New York, NY 10017; No. SSC70; ph: (212) 916-1650.

Swanson, R.G., "Sample Examination Manual," Methods and Exploration Series No. 1, American Association of Petroleum Geologists, 1981. Available from: the American Association of Petroleum Geologists, P.O. Box 979, Tulsa, OK 74101; ph: (918) 584-2555.

U.S. Environmental Protection Agency, "Geophysical Techniques for Sensing Buried Wastes and Waste Migration," Environmental Monitoring Systems Laboratory, Las Vegas, NV, EPA-600/7-84-064, June 1984. Available from: National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161; PB-84-198-449/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Guidance on Remedial Investigations under CERCLA," Office of Solid Waste and Emergency Response, Washington, DC, EPA/540/G-85/002, 1985. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 85-238-616/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Manual of Individual Water Supply Systems," Office of Drinking Water, EPA-570/9-82-004, 1982. Available from: U.S. Environmental Protection Agency, Office of Drinking Water, WH-550, 401 M Street, SW, Washington, DC 20460; or from NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB-85-242-279/AS; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Test Methods for Evaluating Solid Waste, Physical and Chemical Methods," 2nd edition, July 1982, as amended by April 1984, Update 1, and April 1985, Update 2, Office of Solid Waste and Emergency Response, Washington, DC, SW-846. Available from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; Stock No. 55-002-81001-2; ph: (202) 783-3238.

U.S. Geological Survey, "National Handbook of Recommended Methods for Water-Data Acquisition," Office of Water Data Coordination, 1977, with updates. Available from: U.S. Geological Service, Office of Water Data Coordination, MS-417 National Center, Reston, VA 22092; ph: (703) 860-6931.

(b) *Air*. Testing and sampling may include analytical methods or modeling. Modeling should only be performed if testing and sampling methods are inappropriate. Testing and sampling for air may be complex because of the wide range of conditions that may be encountered, including conditions such as: a massive short-term emission, as might occur from a tank car accident; episodic or intermittent releases, as might be created by varying wind conditions that distribute particulates from a tailing pile; and a long-term, low-level release that may come from an open disposal pond.

The rule lists factors to identify in developing a sampling plan, including an appropriate sampling schedule. Objectives based upon the requirements of the testing and sampling need to be established, and the sampling plan designed to meet those objectives.

The authorized official may use the air testing methods listed in the publications below. In addition, the authorized official may use other methods that have been accepted following formal review and evaluation by the U.S. Environmental Protection Agency, the National Institute for Occupational Safety and Health, the American Society for Testing and Materials, and the American Public Health Association. Some examples of these are the following documents:

U.S. Environmental Protection Agency, "Atmospheric Measurements of Selected Hazardous Organic Chemicals," Environmental Sciences Research Lab, Research Triangle Park, NC, EPA-600/53-81-031, May 1981. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 81-250-628/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Characterization of Hazardous Waste Sites—A Methods Manual: Volume II, Available Sampling Methods, Second Edition," Environmental Monitoring Systems Laboratory, Las Vegas, NV, EPA-600/4-84-076, December 1984. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 85-168-771/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Characterization of Hazardous Waste Sites—A Methods Manual: Volume III, Available Laboratory Analytical Methods," Environmental Monitoring Systems Laboratory, Las Vegas, NV, EPA-600/4-84-038, May 1984. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 84-191-048/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Compendium of Methods for the Determination of Toxic Organic Compounds in Ambient Air," Environmental Monitoring Systems Laboratory, Office of Research and Development, Research Triangle Park, NC, EPA-600/4-84-041, April 1984. Available from: ORD Publications, U.S. EPA-CERI, 26 W. St. Clair, Cincinnati, OH, 45268.

U.S. Environmental Protection Agency, "Digest of Ambient Particulate Analysis and Assessment Methods," Office of Air Quality Planning and Standards, Research Triangle Park, NC, EPA 450/3-78-113, September 1978. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 80-198-872/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Network Design and Site Exposure Criteria for Selected Noncriteria Air Pollutants," Office of Air Quality Planning and Standards, Research Triangle Park, NC, EPA-450/485-022, September 1984. Available from: U.S. EPA, Library Services MD-35, Research Triangle Park, NC 27711; ph: (919) 541-2777.

For further information on air modeling, the "Type B Technical

Information Document: Application of Air Models to Natural Resource Injury Assessment" is being prepared in conjunction with this rule.

(c) *Geological resources*. Methodologies for testing and sampling for injuries to soil and other geologic resources are provided in the rule. Specific procedures for implementing the soil methodologies, the largest portion of this resource group, are discussed in the "Type B Technical Information Document: Approaches to the Assessment of Injury to Soil Arising from Discharges of Hazardous Substances and Oil," which is being prepared in conjunction with this rule.

The first three methodologies for testing and sampling for injury to soil, those involving pH, cation exchange, and salinity, involve standard chemical analyses. Some useful references for performing these chemical analyses are provided in:

U.S. Environmental Protection Agency, "Characterization of Hazardous Waste Sites—A Methods Manual: Volume II, Available Sampling Methods, Second Edition," Environmental Monitoring Systems Laboratory, Las Vegas, NV, EPA-600/4-84-076, 1984. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 85-168-771/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Guidance on Remedial Investigations Under CERCLA," Office of Solid Waste and Emergency Response, Washington, DC, EPA/540/G-85/002, 1985. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 85-238-616/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Preparation of Soil Sampling Protocol: Techniques and Strategies," Environmental Monitoring System Laboratory, Las Vegas, NV, EPA-600/4-83-020, August 1983. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 83-206-979/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Soil Sampling Quality Assurance User's Guide," Environmental Monitoring System Laboratory, Las Vegas, NV, EPA-600/4-84-043, May 1984. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 84-198-621/LL; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Test Methods for Evaluating Solid Waste, Physical and Chemical Methods," 2nd edition, July 1982, as amended by April 1984, Update 1 and April 1985, Update 2, Office of Solid Waste and Emergency Response, Washington, DC, SW-846. Available from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; Stock No. 55-002-81001-2; ph: (202) 783-3238.

The fourth method of verifying an injury to soil is by changes to soil microbial respiration. Among the available procedures are those found in:



Anderson, J.P.E., "Soil Respiration," in A.L. Page (ed.), *Methods of Soil Analysis, Part 2: Chemical and Microbiological Properties*, 2nd Edition, pp. 831-871, American Society of Agronomy, Madison, WI, 1982. Available from: American Society of Agronomy, 677 South Segoe Road, Madison, WI 52711; ph: (608) 273-8080.

Tabatabai, M.A., "Soil Enzymes," in A.L. Page (ed.), *Methods of Soil Analysis, Part 2: Chemical and Microbiological Properties*, 2nd Edition, pp. 903-945, American Society of Agronomy, Madison, WI, 1982. Available from: American Society of Agronomy, 677 South Segoe Road, Madison, WI 52711; ph: (608) 273-8080.

To verify an injury to soil by testing for changes to microbial populations, the procedures provided in the documents listed below may be useful:

Anderson, J.P.E. and K.M. Domsch, "A Physiological Method for the Quantitative Measurement of Microbial Biomass in Soils," *Soil Biology and Biochemistry*, 10:263-269, 1976.

Jenkinson, D.S. and D.S. Powlson, "The Effects of Biocidal Treatments on Metabolism in Soil—Part V: A Method for Measuring Soil Biomass," *Soil Biology and Biochemistry*, 8:209-213, 1976.

Karnak, R.E. and J.L. Hamelink, "A Standardized Method for Determining the Acute Toxicity of Chemicals to Earthworms," *Ecotoxicology and Environmental Safety*, 6:216-222, 1982.

To test for an injury to soil that resulted from phytotoxicity, the rule requires either seed germination, seedling growth, root elongation, plant uptake, or soil core microcosm tests. Among the procedures currently available are:

U.S. Environmental Protection Agency, "The Early Seedling Growth Toxicity Test," in *Environmental Effects Test Guidelines*, Section EG13, Office of Pesticides and Toxic Substances, Washington, DC, EPA 560/6-82-002, 1982. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB 82-232-992; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "Experimental Terrestrial Soil-Core Microcosm Test Protocol," Corvallis Environmental Research Laboratory, Corvallis, OR, EPA-600/3-85-047, 1985. Available from: NTIS, 5285 Port Royal Road, Springfield, VA, 22161; PB 85-213-338; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "The Plant Uptake and Translocation Test," in *Environmental Effects Test Guidelines*, Section EG14, Office of Pesticides and Toxic Substances, Washington, DC, EPA 560/6-82-002, 1982. Available from: NTIS, 5285 Port Royal Road, Springfield, VA, 22161; PB 82-232-992; ph: (703) 487-4650.

U.S. Environmental Protection Agency, "The Seed Germination/Root Elongation Toxicity Test," in *Environmental Effects Test Guidelines*, Section EG12, Office of Pesticides and Toxic Substances, Washington, DC, EPA-560/6-82-002, 1982. Available from: NTIS, 5285 Port Royal Road, Springfield, VA 22161; PB-82-232992; ph: (703) 487-4650.

(d) *Biological resources.* Appropriate tests for biological resources are largely identified in the injury definition section of the rule. These tests are discussed in more detail in the document cited in that discussion, "Type B Technical Information Document: Injury to Fish and Wildlife Species." Specific methodologies are numerous and may vary depending upon the organism, type of response being studied, oil or hazardous substance involved, and statistical confidence required. Methodologies may be used that technical literature show are appropriate to the response being tested. In general, for purposes of a damage claim, the authorized officials would only use techniques that have been tested previously for the kind of situation being examined and that have been documented in the technical literature.

#### 5. Quantification

(a) *General.* Sections 11.70 through 11.73 of the rule provide guidance on methods for quantifying the effects of injuries resulting from discharges of oil or releases of hazardous substances. These methods establish the link between injuries to resources and the methods used to determine compensation for those injuries.

Several steps are necessary to convert natural resource injuries to damages, that is, to assign a dollar amount for the injuries. The Injury Determination phase demonstrated that an injury has in fact occurred as a result of the discharge or release. The Quantification phase must determine how much of the resource has been injured, and how "badly," and also must determine what effect the injury has had on services provided by the resource. Determining the effect on services is critical to converting physical and biological changes to dollar amounts, and is explained in more detail below.

Throughout the Quantification phase, conditions following the discharge or release are compared to baseline conditions, which are the conditions that would have existed in the absence of the discharge or release under investigation. Baseline conditions include physical, chemical, and biological conditions as well as services.

The final critical dimension in determining "how much" the resource and associated services have been affected is time, which is referred to here as the "recovery period." Injuries that will recover over a long time period may have greater effects on services than those that will recover quickly, especially if that recovery requires little or no intervention ("restoration"). The final section of the Quantification phase,

§ 11.73, provides guidance on determining recovery periods for various alternatives, including different restoration alternatives and the situation where no actions beyond the removal or remedial actions are carried out.

(b) *Service reduction quantification.* In order to quantify service reduction, the authorized official must first determine the extent of the effects of the injury, or, in other words, how much of the resource has been injured, as provided in § 11.71. In general terms, this reduction might mean the volume of water no longer usable for a specified purpose, the size of a fish population lost, the acres of wildlife habitat changed, or any other physical, chemical, or biological changes resulting from the discharge or release.

To help make these changes useful for the analyses in the Damage Determination phase they must be converted into "services." Broadly speaking, a service refers to any function that one resource performs for another or for humans. Within the non-human part of an ecosystem, plants provide habitat and food for animals, one animal may provide or serve as food for another, or water may be used by fish for support, respiration, and many other functions. This list could be expanded to describe almost any interaction between species or between physical and biological levels. Among these services are the uses that humans make of natural resources. These services would include such things as use of water for drinking, the use of fish or wildlife for food, and the use of many components of the environment for recreation.

An important distinction between services and the physical, chemical, or biological conditions existing in a resource is that the services represent interactions between resources, or between resources and humans. Traditionally humans have valued natural resources in monetary terms on the basis of services provided by the resources. This method logically may be extended to valuing damages to an injured resource on the basis of changes in services. This rule establishes the link between measured adverse changes in the condition of the resource, the injury, and the damages through the measurement of changes in the services provided by the injured resource. This method of determining damages is in accord with traditional economic measures of the value of natural resources.

Using this rule, damages to an injured pond might be estimated by changes in



services the pond provided as fish habitat. The measure of change in services might be numbers of fish, varieties of fish, or the services the fish provide to another resource, such as food for other animals. If the pond had also served as a source of drinking water, the measure of change in services might be the volume of water formerly used for that supply. In either case, damages would be estimated on the basis of lost use of the services or of change in the level of more than one service, and demonstrable changes in all services may be counted when estimating damages.

The methodology to be used in the Damage Determination phase is critical in determining which services to measure in the Quantification phase. Close coordination is required between economists and natural resource specialists in planning and carrying out this phase of the assessment. The authorized official must decide whether to determine damages based upon the lesser of: the diminution of use values; or restoration or replacement costs (§ 11.35). These two approaches require different kinds of results from the Quantification phase. If diminution of use values is chosen, results must be expressed as changes in the uses of the services provided to humans. In this case, the measurements of services not used primarily by humans are useful mainly as intermediate results, although they may be critical in determining changed human use.

On the other hand, if restoration or replacement costs are to be the measure of damages, the non-human services may be equally critical, because the determination of restoration or replacement costs is based on the restoration or replacement of services. In this case, the non-human services may be more important in measuring changes in how well a wildlife habitat or marsh is supporting wildlife, controlling floods, assimilating wastes, and providing any other services that may be important. Human uses may need to be measured for purposes of determining priorities and calculating diminution of use values during the recovery period.

Provision is made in the Quantification phase for directly quantifying the effects of injuries based upon a loss of services dependent on the injured resources, where that direct quantification provides a better measure of the extent of the effect than first measuring a change in the chemical, physical, or biological parameters.

Detailed guidance is not provided on methods for measuring changes in services, in part because the range of

services that can be measured is so broad, and in part because the methods to be used depend greatly on which services are measured. Guidance is provided for certain natural resources, but most methods for measurement of services will have to be determined by the authorized official. The guidance provided for specific resources is primarily on how to choose techniques that are scientifically acceptable and that can provide useful data for measuring services relating to those resources.

Quantification of the effects on the physical resources (surface and ground water, air, and geologic resources) focus on determining the area, or in some cases the volume, exposed to the discharge or release. In addition, the services provided by those resources must be determined. Comparison to baseline is critical to this process.

In the measurement of biological resources, the choice between habitat and population analysis is required to ensure that common units are being used and that double counting is avoided. There may be circumstances where a mixed analysis may be possible while avoiding double counting, if there is little or no interaction between the resources analyzed. For example, a population analysis might be used for a terrestrial resource such as deer, but a habitat analysis might be used for a fish resource affected by the same discharge or release. To some extent, choice of habitat analysis will be more closely related to restoration options, and population analysis to use values, but the relationship is not strict.

The types of biological measurements identified in the rule are those that have generally been used in damage assessments, with the exception of the Habitat Evaluation Procedures (HEP). (Information on HEP is available from: Habitat Evaluation Procedures Group, Western Energy and Land Use Team, U.S. Fish and Wildlife Service, Drake Creek Building One, 2627 Redwing Road, Fort Collins, CO 80526-2899.) HEP has been used widely in analyzing impacts of proposed development projects, and considerable documentation is already available. An information document useful for implementing HEP in assessments, "Type B Technical Information Document: Guidance on Use of Habitat Evaluation Procedures and Habitat Suitability Index Models for CERCLA Applications," is being prepared concurrently with this rule. This document is intended to be a supplement to the materials and training already available for HEP from the U.S. Fish and Wildlife Service.

Life table statistics are widely used in other management and research functions, but their use here is restricted. The conditions generally considered necessary for their valid use are expected to occur rarely in assessments. The reference in the rule to the American Fisheries Society publication, "Monetary Values of Freshwater Fish and Fish-kill Counting Guidelines," (see § 11.71(l)(5)(iii)(A)), does not address or refer to the dollar values assigned to fish species in that publication, but is restricted to the section in that publication providing guidance on methods for conducting valid counts of dead fish.

(c) *Baseline services determination.* The measure of effect in the Quantification phase is a comparison of the conditions found following the discharge or release under investigation with a baseline condition both for services and for biological or physical changes. This baseline will most often represent conditions occurring just prior to the discharge or release, although the definition given in the rule is broader. This broader definition allows for longer-term situations where, even in the absence of the specific discharge or release, significant changes would have occurred in the resource or service being measured. For example, an area might have been primarily a farming community when a dump was first established, but land use changed during the period of hazardous waste dumping, and much of the area might have been converted to industrial use. These land use changes need to be considered in establishing baseline; it may be unreasonable to assess damages based in this case upon lost use as wildlife habitat. In addition to human-caused changes, consideration may have to be given to natural changes, such as ecological succession. This method of defining baseline reflects the principle that a natural resource damage claim should be limited to the damages caused by the injury resulting from actions of the party determined responsible. The rule provides that when it is not technically feasible or cost-effective to determine baseline conditions, the authorized official may, under certain circumstances, establish baseline conditions that do not fully represent actual baseline conditions that existed at the assessment area prior to the discharge or release.

The issue of from which point the calculation of change should be performed frequently has been erroneously related to the question faced by EPA in determining what level of "cleanup" is appropriate in response



actions under the NCP. The objectives of EPA under the NCP and the damage assessment process under this rule differ and, as such, different calculation points are inevitable.

EPA is not always concerned with returning the site to its baseline condition when it determines a cleanup level. Rather, the goal of most response actions is to remove and/or remedy the hazardous substances at a site until they no longer represent an actual or potential threat to public health, welfare, or the environment. The particular cleanup level is driven by the application of applicable or relevant and appropriate environmental standards and other site-specific considerations.

When performing a natural resource damage assessment, the objective is to determine the value of the loss. Standards may be used to determine that an injury has occurred, but the extent of effects for which the responsible party may be found liable may differ significantly from the standard. In some instances, the baseline condition was cleaner than the standard, where in others the standard was exceeded before the discharge or release. Therefore, in many situations the level of cleanup will be different from the baseline. The rule follows the common law principle that the injured party should be made whole again. Thus, quantification of injury and estimates of damages are based upon the change from baseline, rather than on standards.

The rule also requires that the baseline reflect normal variation in the resource and service. For almost any parameter being measured, variability is expected, whether that parameter is a physical measurement, such as concentration of an ion in ground water, or a biological measure, such as population levels of an animal species. Some of those parameters may be relatively constant, or vary on an annual cycle; others can be expected to vary cyclically and dramatically, such as "four-year cycles" of lemmings or "ten-year cycles" of lynx, where populations may vary from nearly zero to many thousands in a given area over the course of a fairly regular cycle. Other parameters may change gradually in one direction, as do population changes of many species during ecological succession, or show random and unpredictable changes. Included in the last category are extreme changes that might fall outside of "normal" variation, but still be due to natural causes. An example of extreme change is destruction of a coastal marsh by hurricane winds and seas.

A baseline should allow for comparison with the normal range of variation, rather than being constrained to a single measurement. For example, a discharge or release may occur or be studied at a time when a population is normally absent or low, but may affect the ability of the affected area to support the population at times when it would normally be high. A chemical change in air or water may be mitigated by dilution at certain times of year, but the same quantity of material may reach deleterious concentrations at other times because of low water flow or different wind conditions. A further constraint is that data for the baseline and for the assessment area should be collected using comparable methods. Unless identical or very similar methodologies are used, different data may simply reflect a difference in the methodologies rather than in the condition being measured.

The preferred method for establishing baseline is to use historical data taken from the assessment area before the discharge or release. In many cases, such historical data for an assessment area may be missing or inadequate, so the rule establishes an alternative means for estimating baseline. In most cases, estimating baseline requires data for similar areas ("control areas") near the assessment area. Preferably, the authorized official will use historical data for the control area if available, after ensuring that the control and assessment areas are similar except for the discharge or release. If historical data are unavailable for both the assessment and control areas, then field data must be collected for the control area following the guidance provided in the rule.

The same materials used for literature searches in performing research are sources for locating baseline data. These materials include general bibliographic references as well as computer data bases and specialized data bases that contain compilations of resource-specific data from many sources. In addition, many parts of the United States have been studied in Environmental Impact Statements (EIS's) or related documents for various kinds of projects. These EIS's may contain baseline data (or references to sources) for the subject area. The Digest of Environmental Impact Statements summarizes all EIS's, and is published by Cambridge Scientific Abstracts, 5161 River Road, Bethesda, MD 20816. A number of Federal and State laws require other planning documents that may be useful. The Federal Government carries out or sponsors research

nationwide on natural resources; the National Technical Information Service (NTIS), in Springfield, Virginia, has a computer searchable data base for locating reports on this research, and also can supply microfiche or paper copies. Local information may be available through State agencies (e.g., water resources, air quality control, fish and game, public health, etc.). If the discharge or release occurred on publicly-held land, the agency managing that land may have data available, and private land owners may have similar data. Nearby universities and colleges may have data from studies done by students or faculty members.

If historical data for both assessment and control areas are inadequate, field data must be collected from control areas. Although each resource will require techniques and procedures specific to that resource, and local conditions will require tailoring procedures to the specific location, the rule provides general guidelines that apply to selection and use of control areas. The general guidelines are to be used together with the specific guidelines for each resource, and are designed to balance the needs for flexibility and rigor.

Because of the importance of water as a resource, extensive data on water quality have been collected by many Federal, State, and local agencies. Most of those historical data deal with traditional water quality measures, such as inorganic ions and microbial content, and only rarely include tests for man-made organic contaminants. A computerized data base that provides access directly to certain large data collections, such as EPA's STORET water quality data base, or other data bases, is available through the National Water Data Exchange (NAWDEX), headquartered at the U.S. Geological Survey (USGS) in Reston, Virginia, and also available through local assistance centers. (For information, contact: NAWDEX, U.S. Geological Survey, MS 421, National Center, 12201 Sunrise Valley Park, Reston, VA 22092; ph: (703) 860-6871.) In addition, the Survey's own water data are available from the National Water Data Storage and Retrieval System (WATSTORE); inquiries may be sent to Reston, VA (WATSTORE, U.S. Geological Survey, MS 437, National Center, 12201 Sunrise Valley Park, Reston, VA 22092; ph: (703) 860-6871) or to USGS offices in each State. When determining baseline for ground water, control wells may have to be selected or drilled. Historical data should be available to determine the extent of the aquifers being studied or to



determine hydrologic characteristics other than the concentration of oil or hazardous substances. Tests done on the water and matrix from control wells should parallel those done during the Injury Determination phase, as for other baseline procedures.

Establishing baseline for surface water resources includes consideration of effects due to low and high water conditions. At high flow or stage conditions, surface water samples will provide information on material washed from the land surface or tidally-transported. Low water conditions will reflect the potentially most concentrated condition of the surface waters. The range of normal concentrations should be determined over the range of water flows or stages, rather than depending strictly on seasonal or annual cycles as might be needed for biological resources. Sediments in the water bodies may represent the major concentration of many contaminants, may provide potential for future releases, and may serve as a potential source of injury for biological resources via food chains. Establishing baseline for marine and estuarine waters may require procedures to account for tidal and current effects on the movement of substances.

Concentrations of materials in air can change due to changing wind conditions, diffusion, varying volatility of the materials, and changes in release rates. Thus, establishing baseline conditions for air presents problems for baselines that differ from the other resources. The rule imposes limitations on use of historical data for an air resource baseline. These limitations, in summary, require that previous testing would have detected the oil or hazardous substance, and that the previous testing indicates that historical levels have been sufficiently predictable to be useful. Detectable concentrations of oil or hazardous substances are normally extremely rare in air, so these requirements are less restrictive than they may seem. Otherwise, monitoring at control sites will have to be conducted by the authorized official with consideration given to siting and to sampling schedules that ensure comparability to the assessment area and conditions, and that avoid interference from other potential sources.

Guidelines on baseline data for geologic resources primarily reflect factors important in determining comparability between the assessment and control areas and the need for appropriate sampling from the control areas.

Because quantification of injury to biological resources will involve habitats and populations, the sources of historical information provided emphasize these types of information. Included among the appropriate habitat maps would be the Wetland Inventory maps prepared by the U.S. Fish and Wildlife Service and by individual States showing locations of specific habitats and ecosystems (U.S. Fish and Wildlife Wetland Inventory Maps are available from: U.S. Fish and Wildlife Service, National Wetlands Inventory, Dade Building Suite 217, 9620 Executive Center Drive, St. Petersburg, FL 33702; ph: (813) 893-3624). Many other kinds of habitat and ecosystem maps are available. The U.S. Geological Survey maintains indices to and has available series of aerial photographs for most areas of the country, including not only topographic photography, but also photographs for studying agricultural and other land uses. With professional interpretation, these materials can indicate trends in habitat. Museum collections also provide records of species occurrence that may avoid duplication of collection efforts; specimens often are accompanied by field notes that provide habitat information. Both Federal and State agencies maintain biological data bases that often include distribution and habitat data. Among these are data bases for endangered species, Natural Heritage data bases maintained by many States, systematic data bases often maintained by museums and herbaria, and data bases for numerous fish and game species maintained by management agencies.

The requirement for species identification is not intended to be a major task. A comprehensive collection of all or most species present is not desirable. The authorized official instead should confirm the identification of species that figure most prominently in the injury assessment and in the selected restoration alternatives. For species that should not be collected for normal taxonomic studies because of low populations or other reasons, modern techniques that require only small blood or other tissue samples from live-trapped animals may be used, as may other techniques that will not create problems for species restoration. These confirmed identities may prove important in subsequent judicial or administrative processes or in later evaluating the success or failure of restoration programs.

(d) *Resource recoverability analysis.* Section 301(c)(2)(B) of CERCLA requires consideration of the "ability of the

ecosystem or resource to recover." This consideration is provided for in § 11.73 of the rule. To satisfy this requirement, the authorized official must estimate the time necessary for recovery, both without restoration efforts beyond the removal of remedial action and "normal" management practices, and with proposed alternative restoration plans. No single formula can be designated for determining the recovery time. Recovery will be considered complete upon the determination that natural resource services have been effectively restored. This determination does not require that the recovered ecosystem or other resource necessarily be identical to the one lost, but merely that all important and measurable services of the lost resource have been restored. Once that point is reached, restoration or replacement is considered complete. The authorized official is given the option of using a shorter period because the costs of efforts expended in estimating very long recovery periods may not provide sufficient benefits when subjected to economic analysis.

The major source of information for the authorized official to use in determining recovery times is the experience that has been gained during other recoveries of similar resources. Journals and published symposia on oil and hazardous substance response, as well as references found in these sources, contain numerous case studies that can be used as the basis for calculating recovery times. EPA has summarized some of these data in Appendix D of their "Technical Support Document for Water Quality-based Toxics Control," Office of Water Enforcement and Permits and Office of Water Regulations and Standards, September 1985. Knowledge of local conditions, including information on ecosystems, organisms, and climate, can be critical in adjusting the results of published studies to particular situations. Modeling may be useful for air, water, and geologic resources, and knowledge of degradation and natural removal processes for the oil or hazardous substance will be central to all time determinations.

#### *E. Economic Issues*

##### **1. Economic Methodology Determination**

The method for determining damages is described in section 301(c)(2) of CERCLA as considering, but not limited to, "replacement value, use value and the ability of the ecosystem to recover." Replacement value (costs) and use value are concepts that have a history of



application. Accordingly, common law and economics provide considerable guidance on selection of a method or methods to calculate damages. In common law, compensation is often determined by the lesser of the diminution of market value or the cost of restoration or replacement.

In terms of economics, compensation for damages would be the lesser of the diminution of use values or the cost of cost-effective restoration or replacement. That is, if use value is higher than the cost of restoration or replacement, then it would be more rational for society to be compensated for the cost to restore or replace the lost resource than to be compensated for the lost use. Conversely, if restoration or replacement costs are higher than the value of uses forgone, it is rational for society to compensate individuals for their lost uses rather than the cost to restore or replace the injured natural resource. Thus, economics and common law agree on a principle of compensation. This rule has adopted an approach parallel to the general common law and economic rules for compensation for damages. Damages in this rule are the lesser of: restoration or replacement costs; or the diminution of use values.

The choice of a measure of damages, i.e., restoration or replacement costs, or the diminution of use values, does not affect the actual use of damage amounts. No matter which measure is chosen, the monies collected from the settlement or award must be used for restoration or replacement. In addition, Federal or State agencies are not precluded from supplementing damage funds with other monies to restore, replace, or enhance the injured natural resource.

The analysis required in the Economic Methodology Determination, § 11.35, is intended to be only a rough approximation of the values derived after the conclusion of the Damage Determination phase. Original research projects should not be conducted at this early phase of the assessment. Existing studies to approximate use values forgone resulting from the injury to the natural resource should be relied upon. Sources of data include journal articles, government publications, such as the documents produced by the Forest Service to implement the Resource Planning Act, and work in progress at many universities. Restoration or replacement costs should be approximated through the use of unit values for past management practices or resource acquisitions. If sufficient information is not readily available at

the time of the development of the Assessment Plan, the determination of an economic methodology can be postponed until after the Injury Determination phase of the assessment. In addition, any necessary refinements in the Economic Methodology Determination can be made as modifications to the Assessment Plan at any time.

One crucial issue in any quantitative damage assessment is the selection of a discount rate. The discount rate is used to translate monetary amounts of costs and benefits occurring in different time periods into a common present value amount. The discount rate used in this rule is given by "Office of Management and Budget (OMB) Circular A-94 Revised." The discount rate listed in this circular is a real rate of 10 percent.

## 2. Restoration or Replacement Methodology

The restoration methodology is described in § 11.81. In the Quantification phase, the authorized official quantifies the effects of the injury in terms of lost or disrupted services. In the Damage Determination phase, the authorized official determines management actions, that is, actions to restore, rehabilitate, replace, or acquire the equivalent, that will return the lost or disrupted services. Management actions are those types of activities that either physically modify the resource or administratively change the species or human use of the resource designed to achieve a specific goal normally reflected in the agency's planning documents. Examples of management actions include such resource related actions as seeding, stocking, supplying water, or hazing to discourage wildlife use of specific habitats. When performing this methodology, the authorized official should look to restore or replace the lost or disrupted services in a cost-effective manner. Any specific methodology that accomplishes this goal is acceptable. However, the method chosen must be the result of an evaluation performed in the Restoration Methodology Plan discussed later. An example of a restoration methodology is the Habitat Evaluation Procedures (HEP). The U.S. Fish and Wildlife Service has examined how the presence of oil or hazardous substances can be incorporated into HEP. This information can be found in "Type B Technical Information Document: Guidance on the Use of Habitat Evaluation Procedures and Habitat Suitability Index Models for CERCLA Applications," which is being prepared concurrently with this rule.

The U.S. Fish and Wildlife Service has also produced guidance on incorporating

cost-effectiveness into HEP. This guidance can be found in "Designing Cost-Effective Habitat Management Plans Using Optimization Methods," by Adrian H. Farmer and Scott C. Matulich, 1986 (available from the Habitat Evaluation Procedure Group, Western Energy and Land Use Team, U.S. Fish and Wildlife Service, Drake Creekside Building One, 2627 Redwing Road, Fort Collins, CO 80526-2897). In addition, the U.S. Fish and Wildlife Service is preparing a microcomputer program called the "Habitat Management Evaluation Model" (HMEM). This model may provide a means of rapidly designing cost-effective management actions for use with restoration or replacement alternatives. The model is based upon the concepts in the Farmer and Matulich document and available at the aforementioned address. These procedures should be reviewed to determine if they can be of assistance in structuring cost-effective restorations or replacements.

If restoration or replacement will form the basis of compensation in the Damage Determination phase of the assessment, the Federal or State agency acting as trustee may also claim damages for the diminution of use values over the time required to perform the restoration. The authorized official should estimate this diminution of use values in accordance with the guidance in §§ 11.83 and 11.84.

## 3. Restoration Methodology Plan

The selection of the cost-effective restoration or replacement measures for the Damage Determination is made in the Restoration Methodology Plan. The guidance provided in § 11.81 concerning the restoration methodology is to be followed in developing the Restoration Methodology Plan and in selecting the cost-effective alternative.

The Restoration Methodology Plan is intended to encompass the requirements of a good environmental analysis. Fundamental to the plan are the requirements for an analysis of alternative means of restoring or replacing the lost services and public review and input to the decision. An interdisciplinary analysis of both direct and indirect impacts of the alternatives also is called for in the rule. Finally, in accordance with accepted procedures for environmental analysis, the Restoration Methodology Plan is required to form the basis from which the post-award Restoration Plan will be tiered.

The purpose of the Restoration Methodology Plan is to compute damages. Therefore, the plan is not



viewed as being of sufficient detail to carry out a restoration, rather the level of detail is driven by the needs of the damage determination. The later post-award Restoration Plan, when the level of funding is known, is expected to focus on the selected alternative and, therefore, provide more detail on the actual restoration.

The authorized official is encouraged to combine the requirements for the Restoration Methodology Plan with other planning or analytical requirements that may apply to a specific restoration or replacement decision. Some examples of other such requirements include a restoration plan required under section 111(i) of CERCLA for claims against the Fund, Remedial Investigation/Feasibility Studies (RI/FS) required under the National Contingency Plan, analyses required under the National Environmental Policy Act of 1969 (NEPA), or land use planning documents required under the various land management statutes. The Restoration Methodology Plan is designed, in particular, to satisfy the requirements of NEPA without additional analysis at this stage.

#### 4. Use Value Methodologies

Section 11.83 is divided into two parts—one for resources that are traded in markets and the other for resources that are not traded in markets. If the injured resource is traded in a market, the diminution of the market price should be the measure of lost use value. The diminution of the market price will not always coincide with the change in the loss in social value, but this amount is widely recognized by courts as the measure of damages when a commodity is injured.

When the injured resource is traded in the market, the authorized official must determine whether the market is "reasonably competitive" in order to use this methodology. While not defined in the rule, reasonably competitive means that the assumptions underlying a competitive market are fulfilled to a reasonable degree. This determination may be made on a case-by-case basis.

If the injured resource is not traded in a market, but similar or like resources are traded in a market, the authorized official should use an appraisal technique to determine damages. To the extent possible, all appraisals should be in conformance with the "Uniform Appraisal Standards for Federal Land Acquisitions" (Uniform Appraisal Standards) (see § 11.83(c)(2)(i)). In those instances when State statutes may be at variance with these standards, a State authorized official acting as trustee

should follow the applicable State's guidance on performing appraisals.

The Uniform Appraisal Standards cover three general appraisal approaches: the cost approach; the income method; and the comparable sales approach. The cost approach is inappropriate in implementing the appraisal method since the restoration methodology (described in § 11.81) explains how restoration costs are to be determined. While the income method in the Uniform Appraisal Standards is appropriate, it should only be performed in accordance with the "Factor Income" method given in the rule. The diminution of market price and the appraisal method jointly comprise the marketed resource methodology in the rule. Only when the injured resource is not traded in a market, or when that market is not reasonably competitive, and no comparable sales are available for use in an appraisal, may the authorized official use any of the nonmarketed resource methodologies listed, or any that meet the acceptance criterion.

CERCLA provides that a Federal or State agency is acting as a trustee when seeking recovery for a loss to a resource. Accordingly, it is damage to the public that may be recovered. The use values that can be claimed by a Federal or State agency are those associated with the loss to the public in general because of the discharge or release. These include: losses in recreation and other public uses; fees and other payments made to the agency for the private use of the public resource; and the economic rent, that is, the excess of total earnings of a producer of a good or service over the payment required to induce that producer to supply the same quantity currently being supplied, accruing to private individuals engaged in commercial ventures because the government does not charge the producer a price or fee for the private use of the public resource.

Under this rule, the Federal or State agency acting as trustee cannot collect for: taxes forgone, because these are transfer payments from individuals to the government; wages and other income lost by private individuals, except for that portion of income that represents economic rent, because these values do not accrue to the agency and may be the subject of law suits brought by the individuals suffering the loss; or any speculative losses. The costs incurred by private individuals engaged in commercial ventures may be considered in performing the nonmarketed resource methodologies listed in the rule, but the purpose of this use is to enable the authorized official to

assign a value to the resource, not to collect that private cost.

The Federal or State agency acting as trustee can claim all the net income lost, not just the economic rent, from a commercial venture when the agency is the sole or majority owner of the venture that is affected by the discharge or release. For example, if the Federal or State agency sells water and that water supply is injured, that agency can claim the change in net income as damages. This procedure allows the agency to file one claim to obtain all damages associated with the discharge or release, rather than two.

Nonmarketed resource methodologies may be used to measure a diminution of use values. The methodologies listed in § 11.83 are examples of those that are permitted under this rule. Discussions of these methodologies can be found in many natural resource or environmental economics textbooks, such as in A. Myrick Freeman III, "The Benefits of Environmental Improvement: Theory and Practice," Resources for the Future, Inc. (Baltimore, MD: Johns Hopkins University Press, 1979), available from: Resources for the Future, Customer Services, P.O. Box 4852, Hampden Station, Baltimore, MD 21211; ph: (202) 328-5025.

Several of the nonmarketed resource methodologies listed in § 11.84 are also listed in the "Procedures for Evaluation of National Economic Development (NED) Benefits and Costs in Water Resources Planning (Level C)" (Procedures) (see § 11.83(a)(3)). To the extent practicable and applicable, the authorized official should follow the guidance in this document. The discussion of unit day values in the Procedures should be supplemented with other sources of existing estimates of use values, such as that in the forthcoming Final Environmental Impact Statement, "1985-2030 Resources Planning Act Program," Appendix F (Resources Program and Assessment Staff, Forest Service, U.S. Department of Agriculture, 3306 S. Agriculture Building, P.O. Box 2417, Washington, DC 20013).

Other studies may also provide the authorized official with more background. One supplemental source is W.H. Desvousages, V.K. Smith, and M.P. McGivney, "A Comparison of Alternative Approaches for Estimating Recreation and Related Benefits of Water Quality Improvement," U.S. Environmental Protection Agency, Office of Policy Analysis, Washington, DC, EPA-230/05-83-001, March 1983 (available from: Office of Policy Analysis, U.S. EPA, 401 M St. SW, Washington, DC 20460, or from NTIS). In



addition, further information on the use of nonmarketed resource methodologies can be found in "Type B Technical Information Document: Techniques to Measure Damages to Natural Resources," which is being prepared in conjunction with this rule.

The list of nonmarketed resource methodologies cannot be comprehensive. The acceptance criterion in § 11.84 is designed to ensure that methodologies consistent with economic theory, yet not specifically listed in the rule, are available for use in estimating damages. This acceptance criterion stipulates that the methodology measures willingness to pay in a cost-effective manner.

#### F. Glossary

The following terms are defined using generally accepted and applied definitions. The definitions provided here are simply for clarification and are not included as regulatory language.

(a) "Assimilate" means to absorb a substance into an organism's body, tissues, or cellular structure and does not refer to substances in the digestive tract or respiratory system that have not otherwise been absorbed across membranes or epithelia.

(b) "Behavioral abnormalities" means alteration of overt activities by an animal including locomotor, reproductive, care of young, food gathering, or avoidance of predation.

(c) "Bioaccumulate" means the process whereby chemical substances enter aquatic or terrestrial organisms through both bioconcentration and uptake of chemical residues from dietary sources.

(d) "Bioconcentrate" means the process whereby either chemical substances enter aquatic organisms through gills or epithelial tissue directly from water, or chemical substances enter terrestrial organisms through respiratory or epithelial tissues directly from air; and the concentration of the chemical substances in the tissue fluids of the organism exceeds that of the air or water.

(e) "Biomagnify" means the process by which tissue concentrations of bioaccumulated chemical substances increase as they pass up the food chain through two or more trophic levels.

(f) "Cancer" means a general term frequently used to indicate any of various types of malignant neoplasms, most of which invade surrounding tissues and may metastasize to several sites.

(g) "Constant dollar" means inflation adjusted dollars at a specified base year.

(h) "Controlled experiment" means any laboratory, pen, or field test in which an investigator regulates the exposure of the biological resource to the oil or hazardous substances and which includes comparison to organisms treated similarly except for such exposure.

(i) "Disease" means an impairment of a biological resource's ability to resist or recover from an infectious agent.

(j) "Existence value" means the dollar amount of the willingness to pay or willingness to accept of individuals who do not plan to utilize a resource now or in the future, but are willing to pay to know that the resource would continue to exist in a certain state of being.

(k) "Expected present value" means the dollar amount derived by the period-by-period summation of the various levels of benefits or costs associated with alternative assumptions on parameter values, where each level is weighted by the probability of the occurrence of the parameter value, and discounted by period, using the discount rate as determined in § 11.83 of this part.

(l) "Free-ranging" means biological resources in their natural habitat, in contrast to biological resources maintained in captivity.

(m) "Genetic mutations" means a detectable chromosomal aberration that can be correlated with a detrimental effect on the survival or reproductive success of the biological resource.

(n) "Neoplasm" means an abnormal mass of tissue, the growth of which exceeds and is uncoordinated with that of the normal tissue and persists in an excessive manner after cessation of the stimuli that evoked the change.

(o) "Net expected present value" means that costs are subtracted from benefits in the definition of expected present value.

(p) "Option value" means the dollar amount of the willingness to pay or willingness to accept of individuals who are not currently using a resource, but wish to preserve their option to use that resource in a certain state of being in the future.

(q) "Physical deformation" means congenital or acquired alterations in shape, size, and structure of an organism or any part of an organism, including malformations.

(r) "Physiological malfunction" means alterations in biochemical and physiological processes necessary for maintenance of homeostasis and reproduction, including such processes as fluid transport, digestion, metabolism, excretion, respiration, locomotion, and nervous and endocrine integration.

(s) "Willingness to accept" means the amount of money an individual must be

given to be as well off as he was prior to the occurrence of an event.

(t) "Willingness to pay" means the amount of money an individual would be willing to pay to have avoided the occurrence of an event.

#### III. Responses to Comments

The Department received numerous comments on the proposed rule. The considerable time and effort expended on the comments and the thoughtfulness of the comments are greatly appreciated. Most comments commended the Department's efforts in developing a well-thought-out and logical assessment process. The general approach of the proposed rule has been maintained in the final rule. At the same time, the final rule has benefited from many suggested improvements in clarifying its intent and improving the accuracy of the damage assessment process. Changes made to the proposed rule in response to comments are explained in the section-by-section that follows. A number of additional minor changes of a non-substantive nature have been made to ensure clarity of language, correct errors, and to conform to proper Code of Federal Regulations usage.

##### A. Revisions to Subpart A—Introduction General Comments—Relationship to Response Actions

There may have been a misunderstanding among some comments as to the purpose of a natural resource damage assessment. Many comments made reference to the use of a damage assessment to effect a "cleanup" or "remedy." Other comments maintained that the natural resource damage assessment process would result in two remedial actions being undertaken. This rule, however, is a companion to other regulations under CERCLA that are specifically intended to deal with response and remedial actions. As such, this rule is intended only to assess the residual damages for injuries to a natural resource that might remain after remedial actions or other response actions were completed.

The Department notes that while this rule does not provide for a "second remedial action," it does provide for additional measures when necessary to compensate for residual injuries through restoration, replacement, rehabilitation, or acquisition of equivalent natural resources, actions that may not lie within the scope of the remedial alternative selected for the site in question. In addition, this rule allows for compensation for loss of use values suffered from the time of the discharge or release responsible for the injury until



the lost services provided by the natural resource are restored. The rule does, however, encourage natural resource damage concerns to be incorporated as fully as possible in NCP response actions.

One comment held the mistaken impression that damages determined in accordance with the rule were only available on a reimbursement basis. The comment also expressed concern as to the proposed rule's reference to a priority order for restoration work.

The Department notes that damages may be awarded once a demand is made. The damage award cannot be spent until the Restoration Plan is developed, but the Plan itself is based on the amount of the award. The Department points out, however, that claims against the Hazardous Substance Response Trust Fund must be for costs incurred as specified by the Natural Resource Claims Procedures promulgated by EPA at 40 CFR 306 (December 13, 1985, 50 FR 51205). Also, no priority order for restoration work is included or intended in the rule.

Several comments expressed concern over how the assessment process will be integrated with the remedial investigation/feasibility study (RI/FS) process, especially in light of the long-term nature of some remedial actions. Many comments requested further practical guidance on how to effect this coordination.

The Department is unable to provide much additional guidance beyond that already provided in this rule and its preamble until some practical experience in the application of this rule has been gained. The Department can only emphasize the critical need for authorized officials and lead agencies to work closely together throughout the RI/FS process. The Department does believe that to properly account for the effects of remedial actions, the Quantification phase generally should not be initiated until the remedy has been selected and is being implemented. The baseline, however, is determined as the level of conditions prior to the discharge or release under investigation, not as the conditions after the remedy has eliminated or mitigated the injury. Measurement of the change from baseline would account for the effects of the remedial action. If a remedial action is going to be significantly delayed, and a damage claim must be brought because of the statute of limitations, the rule does allow for inclusion of the "anticipated" effects of remedial actions.

Another comment expressed concern that the rule's concept of residual damage may prove contrary to the

overall policy of the CERCLA program, and that use of the residual damage concept could lead to the establishment of an unreasonably low action level to limit residual damages, thereby suggesting a preference for the remedial action option of media removal with off-site disposal. On-site contaminant containment, the comment continued, is often the most desirable remedial option because it reduces adverse impacts at the site and minimizes potential impacts in otherwise unaffected areas. Finally, the comment noted that, if the concept of residual damages is not balanced with the concept of overall benefits, it is unlikely that cost-effective and environmentally sound on-site containment remedial options would be considered viable for implementation at CERCLA sites.

The Department agrees that on-site containment may often be the best remedial alternative and does not intend that use of the residual damage concept should increase the number of off-site remedies. Federal and State agencies acting as trustees must coordinate closely with the lead agency under the NCP to ensure that the remedy selected for the site is balanced against the overall impact on the environment, both on- and off-site.

Finally, one comment correctly noted that the current CERCLA case law imposes liability for a natural resource damage claim only if the release or the threatened release causes response costs to be incurred. However, the comment then incorrectly concluded that this interpretation suggests that if no remedial action is deemed appropriate, there is no cognizable injury to natural resources that may be assessed.

The Department notes that CERCLA defines response costs to be much broader than simply remedial action costs. "Response" includes "remove and removal" costs, which include monitoring, assessing, and evaluating the release (see section 101 (25) and (23) of CERCLA).

#### *General Comments—Challenges to the Rule*

One comment expressed concern as to the appropriate time to challenge inappropriate applications of the methodologies contained in the rule. The comment stated that the appropriate time to challenge a particular application of any of the various alternative methodologies that might be used under this rule is when the methodologies are applied in an actual assessment.

The Department agrees that the specific application of an allowable

methodology in an assessment setting can be challenged within the context of the damage claim litigation. Such an action, however, would not be a challenge to the rule, nor a challenge to the inclusion of the methodology in the rule. The provisions of the rule itself cannot be challenged after the ninety-day period provided for in section 113(a) of CERCLA.

#### *General Comments—Punitive Damages*

One comment took issue with the Department's statement that natural resource damages under CERCLA are intended to be compensatory, not punitive. The comment stated that CERCLA expressly provides for punitive damages in some cases (section 107(c)(3)), and that CERCLA was intended to preserve traditional tort remedies, expressing no intent to cut off punitive damages. The comment stated that punitive natural resource damages were especially important because of section 114(b) of CERCLA, which precludes compensation for damages pursuant to CERCLA in addition to any other Federal or State law. The comment suggested that the rule should be revised to provide that, in the case of outrageous conduct by a responsible party, the trustee may seek punitive damages, reviewable in a subsequent proceeding by a court.

The Department does not believe that Congress intended that the assessment regulations should include provision for punitive damages. Section 107(c)(3) of CERCLA, by its language, applies only to a refusal to comply with removal or remedial action orders. The natural resource damage assessment regulations are intended to measure, as accurately as possible, the "loss" suffered by the public for injuries to natural resources. Any additional damages based on the intent of the responsible party at the time of the discharge or release would be beyond the scope of this rule, and, in the Department's interpretation of the statute, not authorized by section 107(f) of CERCLA.

#### *General Comments—Administrative Process*

Several comments objected to the level of discretion given to a trustee agency to make the significant decisions called for in the rule. The comments suggested a national review panel, an arbitration panel, or an administrative appeals board to oversee the assessment process.

The Department does not support the establishment of any type of oversight mechanism, since the rule contains an administrative process to provide for



review of the authorized official's exercise of discretion. While it is true that the rule commits many important decisions to the discretion of the authorized official, the rule provides criteria by which the decision can be evaluated and specifically subjects the decisionmaking process to review by other affected trustee agencies, any potentially responsible parties, the public, and ultimately the courts. The Department believes that review and resolution of disputes on a case-by-case basis by the parties directly involved is more effective than imposition of the judgment of a national group.

#### Section-by-Section Comments

##### Section 11.10 Scope and applicability.

In response to several comments, the Department has changed the language of § 11.10 to clarify that the procedures specified in the rule apply only to "assessments initiated after the effective date of [the] final rule." Procedural devices such as the rebuttable presumption do not apply to assessments performed pursuant to the proposed rule. Also, the Department notes that whether an assessment is initiated at the discretion of the Federal or State agency acting as trustee, CERCLA does not mandate assessments; it simply authorizes damage claims.

##### Section 11.11 Purpose.

The comments received on the purpose of the rule centered around the role and definition of the rebuttable presumption in the assessment process.

One comment suggested that to compensate for the advantage that the rebuttable presumption provides to a Federal agency, the final rule should state explicitly that the damage assessment must result in a "reasonable" damage determination. The Department has carefully developed the natural resource damage assessment process in this rule and has selected methodologies and criteria for the various steps of the process to ensure the "reasonableness" of the damage assessment. Therefore, there is no need for an additional reasonableness limitation to compensate for the rebuttable presumption.

One comment maintained that the CERCLA 111(h)(2) rebuttable presumption raises concerns about due process because the trustee is given virtually unlimited discretion to fix the amount of the damage assessment and is protected by the rebuttable presumption provision. The Department believes that the assessment process required in the rule ensures that the

authorized official's discretion is not unlimited and that the damage assessment will be reasonable. Therefore, the rule does not deny due process.

Another comment suggested that the Department clarify whether the rebuttable presumption applies to the trustee's choice of methodologies and their application, or only to the (final dollar) assessment. It is the dollar figure representing the damage assessment that is entitled to a rebuttable presumption, rather than the choice of methods for arriving at the dollar figure. The rebuttable presumption attaches to the dollar figure, however, only if it has been derived in accordance with proper application of the methodologies in the rule. The rebuttable presumption does not necessarily attach to each individual decision as to the proper application of methodologies allowed.

Several comments suggested that the rebuttable presumption should apply to assessments by State trustees as well as Federal trustees. The question of the interpretation of the rebuttable presumption provision in CERCLA also arose prior to the formulation of this rule in the context of the Natural Resource Claims Procedures, 40 CFR 306, promulgated by the Environmental Protection Agency (EPA). A full discussion of the resolution of this issue is contained in section V(C) of the preamble to that final rule (50 FR 51212) for the Natural Resource Claims Procedures. In brief, after reviewing comments and considering revisions to the NCP, EPA concluded that the language of section 111(h)(2) of CERCLA, when read in conjunction with section 111(h)(1) of CERCLA, which refers only to "damages . . . assessed by Federal officials," only allowed the provision of the rebuttable presumption to be extended to Federal officials. The Department of the Interior has adopted a position on this issue that is consistent with the Executive branch's prior decision on the interpretation of CERCLA in this matter.

The Department notes that, as is mentioned in the EPA preamble, it may be possible for Federal and State authorized officials to work together on assessments and then qualify for a rebuttable presumption.

Numerous comments were received on the issue of the rebuttable presumption as discussed in the preamble to the proposed rule, relating to the Department's interpretation of the application of the presumption in any particular judicial setting. After reviewing the issues raised with other Federal agencies and departments, the Department believes that it is

inappropriate to attempt to define how this essentially legal mechanism would operate in this rule.

The Department notes that § 11.10 has been clarified to explicitly state that this rule is an optional process for Federal and State authorized officials, however, use of the rule by Federal officials acting as trustees is required if their damage assessment is to be accorded the rebuttable presumption pursuant to section 111(h) of CERCLA.

##### Section 11.12 Biennial review.

Several comments encouraged the Department to establish formal procedures for requiring the review of damage assessments performed and the submission of assessment documents to the Department in order to facilitate the Department's biennial review of the regulations.

The Department has not included such formal regulatory requirements in this final rule. However, the Department strongly encourages all parties who have been involved in a natural resource damage assessment to communicate their successes, problems, and concerns with the application of this rule to specific incidents to the Department. Such communications should be sent to the address given at the beginning of this preamble until further notice. The Department agrees with the comments that only with experience can the possible inadequacies of the assessment process become apparent. The Department encourages ideas for voluntary exchanges of information to assist in the review of the rule.

##### Section 11.14 Definitions.

§ 11.14(a) "Acquisition of the equivalent" or "replacement"

One comment suggested that "acquisition of the equivalent" or "replacement" be defined as the substitution of "the same or substantially similar" services because, in the comment's view, the term "related services" is not sufficient to comply with CERCLA. The Department agrees and has revised the definition accordingly. In addition, this change has also been made in § 11.14(ii).

§ 11.14(c) "Assessment area"

Several comments suggested that the term "assessment area" be defined in terms of affected resources rather than affected geographical areas. The Department concurs and has incorporated the term "natural resources" into the definition of assessment area in § 11.14(c) of the rule.

Several comments suggested that "damage assessment area" and "injury



assessment area" be distinguished. The comments held that damage assessment area should include areas directly or indirectly affected by the injury. The Department notes that the proposed rule did not define either of these terms, nor does this final rule. The Department believes that sufficient flexibility has been established in this final rule to allow the Federal or State authorized official acting as trustee to include all areas of direct or indirect injury or damages in the damage assessment.

#### § 11.14(d) "Authorized official"

In response to comments expressing the concern that the rule could be construed as allowing potentially responsible parties to be designated as "authorized officials" or even as "lead authorized officials," a revision has been made to the definition of "authorized official" and of "lead authorized official," in § 11.14(w), to clarify that only Federal or State officials may act as authorized officials.

#### § 11.14(e) "Baseline"

Some comments stated that the concept of baseline should reflect all pre-release conditions, rather than just the condition of the assessment area immediately preceding the release that caused the injury for which damages are being assessed. In addition, one comment recommended that the concept of cumulative effects of incremental releases be incorporated into the definition of "baseline" so that restoration to conditions prior to the first of several releases that cumulatively caused the injury would be required.

The Department disagrees with the comments and has not made these changes. Where there is a series of releases, baseline is determined by looking to the condition of the injured resource in the absence of the release or any number of releases that can be included in the current assessment. Whether cumulative releases can be assessed will depend upon the application of the liability provisions of section 107 of CERCLA to the incident in question in accordance with governing case law.

Some changes were made to the definition of the term "baseline." These changes are discussed in the response to comments on § 11.72 Quantification phase—baseline determination.

#### § 11.14(h) "Committed use"

One comment suggested that "another party," as used in the definition of "committed use," should include local governments or private parties. The Department has revised the definition to clarify that the key issue is that the use being measured is a public use and has been documented as a public use. The

identity of the party documenting the use is not controlling, so long as the documentation is a matter of public record.

Another comment maintained that the definition of "committed uses" should clarify that such uses are compensable only if they are public uses. The Department believes that this concept was embodied in the proposed rule. However, because of some confusion as to the meaning of the definition, it has been reworded to make the concept explicit.

One comment recommended that the definition of "committed use" be revised to allow a trustee to commit a use at any time to protect particularly important or sensitive resources.

The Department disagrees with this comment. In order to arrive at a fair value of compensation, the commitment to the use must be made prior to the discovery of the injury.

Another comment stated that the definition of "committed use" should be revised to reflect natural resource uses that are legal and consistent with uses of similar public resources in compatible areas. The comment asserted that the current definition is too restrictive because it includes only documented past uses and excludes present uses. Another comment correctly interpreted and concurred with this definition. However, the comment noted that more than one interpretation is possible. This comment requested that the definition of "committed use" be revised to explicitly include all current uses of an injured natural resource, but only those future uses that have been documented by the trustee or another party as planned future uses. The comment maintained that this interpretation prevents assessment of speculative resource uses while allowing trustees to measure accurately current and planned resource uses.

Because of the confusion, the Department has rewritten this definition to explicitly clarify that only future uses need to be documented and that these uses are included as committed uses.

#### § 11.14(i) "Control area" or "control resource"

One comment suggested that language be added to the definition of "control area" to provide that if the control area does not contain as diverse or vital a population as existed at the assessment area before the release, the baseline should be adjusted to account for such conditions. The comment held that such a change would better protect biological diversity. The Department believes that this change is not required. The rule defines and discusses the choice and use of a control area and its relationship

to the baseline sufficiently to enable the authorized official to use these terms as is needed for the assessment.

#### § 11.14(j) "Cost-effective" or "cost-effectiveness"

Several comments suggested that the definition for "cost-effectiveness" be expanded to apply whenever "the same or similar" level of benefits are being considered. The Department agrees and has made this change. In many cases benefits may not be exactly the same, but may be similar in nature; cost-effectiveness should hold in these cases. While the reasonable cost test would theoretically cover this problem, the definition of cost-effectiveness was changed to avoid confusion.

One comment argued that "cost-effectiveness" is the appropriate standard used in the assessment process; that "reasonable costs" is not needed to a substantial degree and is inadequate. Another comment stated that cost-effectiveness and reasonable costs are clearly explained in the rule and preamble, are well applied, and that the rule does an excellent job of balancing the need for a fair and defensible assessment of damages while minimizing the cost of an assessment.

The Department points out that under CERCLA the authorized official can recover only the "reasonable costs" of assessments. As such, both the reasonable cost and cost-effective criteria apply. The Department notes that cost-effectiveness, as defined in this part, refers only to actions taken pursuant to the natural resource damage assessment regulations. A cost-effectiveness definition for actions taken pursuant to the NCP was published at 40 CFR 300.68(i).

#### § 11.14(l) "Damages"

One comment recommended that the definition of "damages" be revised to provide that only lost public services and public uses are compensable, and that damages are to be measured by the lesser of cost-effective restoration or replacement and diminution of use values.

The Department points out that this rule limits the damages compensable to authorized officials to the loss to the general public, in §§ 11.81 and 11.83. As such, defining damages as the comment suggests would be redundant. Consequently, this change was not incorporated into this rule.

One comment noted that while the definition of damages in this section was reasonable, this definition was effectively expanded in §§ 11.15(a) and 11.80(f)(1) of the proposed rule. This comment suggested that the definition of damages, in § 11.14(l), be expanded to



incorporate the concepts in §§ 11.15(a) and 11.80(f)(1). The Department notes that § 11.14(l) provides the basic definition of damages as compensation for an injury. Sections 11.15(a) and 11.80(f)(1), and other sections, elaborate on how this compensation is to be measured. To incorporate all of this elaboration into the definition section would be unwieldy and unworkable.

#### § 11.14(m) "Destruction"

One comment suggested that tissue concentrations of hazardous substances in animals, fish, or plants in excess of FDA levels constitute a "total loss" of these resources, within the meaning of the definition of "destruction." Several comments believed that "destruction" should be defined as "irreversible loss of the services of a natural resource" because a resource is not lost, even when extensively damaged; only its services are lost.

The Department has defined "injury" to include the term "destruction" and has provided specific injury definitions in § 11.62 for each category of natural resources. These issues are discussed further in the responses to comments on § 11.62.

#### § 11.14(o) "Drinking water supply"

Several comments asserted that the definition of "drinking water supply" is too broad or too vague. Comments suggested that the proposed rule utilize the Safe Drinking Water Act (SDWA) definition of public water supply (40 CFR 141.2(e)) as a water supply that provides 15 service connections and serves 25 persons at least 60 days per year.

The Department notes that the definition of drinking water supply is taken directly from the definition in section 101(7) of CERCLA.

#### § 11.14(t) "Ground water resources"

Several comments suggested that the definition of "ground water resources" is too broad; one comment proposed to limit such resources to aquifers because those are the only such resources "capable of providing some use."

The Department disagrees with these comments. It is true that aquifers are useful ground water resources and can provide drinking water supplies and irrigation. However, the Department recognizes that "ground water resources" has been defined broadly. This definition recognizes that ground water exists as a complex and interrelated system. An injury to waters in the saturated zone is an injury to ground water resources. Such waters may be extracted and used directly and/or may migrate to and contaminate aquifers.

One comment recommended that the portion of the definitions of ground

water resources and surface water resources relating to "rocks and sediments" be explicitly stated to apply only to this rule. The comment suggested that these definitions would otherwise establish undesirable precedents for interpreting other regulations.

The Department does not believe that the definitions are either unique or confusing. The Department feels that adequate guidance has been provided to ensure that the definitions apply only to this rule.

#### § 11.14(v) "Injury"

One comment stated that the definition of "injury" be explicitly limited to the change in services from baseline less mitigation of those lost services resulting from response actions. The Department points out that the definition, as well as the concept of injury, has been discussed in detail elsewhere in this preamble. The comment is addressed further in the response to comments on § 11.71 of the rule.

#### § 11.14(w) "Lead authorized official" (See discussion for § 11.14(d).)

#### § 11.14(x) "Loss"

One comment requested clarification on whether a "measurable adverse reduction," within the meaning of the definition of "loss," includes a statistically significant reduction at a probability of  $P=0.05$  from a control or reference site.

The Department believes that the measure of a "measurable adverse reduction" would be determined in the Assessment Plan phase of an assessment, in accordance with the stipulation that all assessments be designed and planned to follow appropriate scientific procedures. The specific level of significance can only be determined in conjunction with the type of test being used and the case-specific application of that test. Because of this, the level of significance required is left unspecified in this rule.

#### § 11.14(z) "Natural resources"

One comment suggested that the Department provide a more detailed definition of the term "natural resources" to emphasize that only public and not private resources are within the scope of this definition.

Section 101(16) of CERCLA defines natural resources as those resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, or any foreign government." The Department believes that Congress has defined "natural resources" with sufficient specificity to leave no doubt that resources owned by parties other than Federal, State, local, or foreign governments (i.e., privately-

owned resources) are not included. The Department has therefore retained the CERCLA definition of natural resources in § 11.14(z) of this rule.

Another comment held that the rule allowed the assessment of resources not covered by CERCLA, because throughout the rule, the term "resources" is used instead of "natural resources."

The Department has amended the definition of "natural resources" to clarify that the term "resources" is equivalent to the term "natural resources."

One comment urged the Department to state explicitly in the rule that only two types of private losses are not subject to trustee recovery, namely, change in value of injured private property and lost private business opportunity. The comment further stated that only when the potentially responsible party demonstrates that a private cause of action is available to recover private losses should a trustee be barred from recovering those losses.

The Department notes, as stated above, that section 101(16) of CERCLA clearly indicates that damage to privately-owned natural resources are not to be included in natural resource damage assessments. Private resource owners are free to pursue private damage actions to recover for injuries to their resources.

Several comments held that the statement in the proposed rule that "direct losses suffered by private users of public resources" are not compensable suggests that trustees will be precluded from recovering natural resource damages under CERCLA.

The Department believes that these comments have misinterpreted the concept of public use embodied in the proposed rule. "Private uses" are essentially synonymous with for-profit uses. For example, an enterprise that rents boats for recreation at a public lake is a private use. Those who pay a fee for entry to the lake, by contrast, enjoy a public use. If the lake is injured by a hazardous substance release, a Federal or State authorized official may recover the loss in fees from visitations forgone due to the discharge or release. However, the Federal or State authorized official may not recover the lost wages or income to those who conduct a business there.

One comment recommended a limited exception to the provisions of the rule that private uses of public resources are not compensable in order to protect the public interest in resources that are the subject of scientific studies being conducted by research teams from private educational institutions.



The Department feels that there is no need for such an exception. Non-profit scientific research performed for a public purpose by public or private institutions is a public use and, therefore, compensable under this rule.

#### § 11.14(ee) "Reasonable cost"

Several comments objected to the definition of "reasonable cost" in the proposed rule because, according to the comments, the increment of extra benefits of one method over another cannot be known until an assessment has actually been performed using those methods. Other comments asked for clarification of "extra benefits" or interpreted that phrase to mean "a larger damage assessment."

In response to these comments, the definition of reasonable cost has been changed in three places. The phrase "extra benefits" in the second part of the definition has been modified by the phrase "in terms of the precision or accuracy of estimates." This explicit statement has been added for clarity, although most of the comments correctly understood that the proposed rule implicitly meant this.

The second change was to add the term "anticipated" before the phrase "increment of extra benefits" and to add the phrase "anticipated increment" before the term "costs" in the second part of the definition. This change makes it clear that the authorized official acting as trustee should make the judgment on what is "reasonable," based on estimates of costs and benefits, as suggested by the comments.

The third change was to add a third part to the definition that states "the anticipated cost of the assessment is expected to be less than the anticipated damage amount determined in the Injury, Quantification, and Damage Determination phases." This change is also in response to comments that correctly understood that this requirement was one underlying the entire assessment process outlined in the proposed rule, but thought that this concept should be stated explicitly.

#### § 11.14(ff) "Rebuttable presumption"

Comments on the definition of "rebuttable presumption" have been discussed with the comments on § 11.11 of this rule.

#### § 11.14(gg) "Recovery period"

Some comments objected to the discretion given to the trustee to select a "lesser period of time" for the recovery period rather than the "longest length of time required to return the services of the injured resources to their baseline conditions."

The Department agrees that a lesser period of time should not be selected arbitrarily, but believes the rule should

provide this flexibility in order to allow the authorized official to fit the assessment to the analytical requirements of the resource, particularly where exceptionally long recovery periods, while theoretically correct, may have insignificant effects on the damage assessment.

One comment requested clarification on whether the recovery period extends to injuries resulting from releases that began prior to the enactment of CERCLA and are continuing. Specifically, the comment urged that the rule be clarified to reflect Federal case law that, in the comment's view, establishes the retrospective nature of sections 107(f) and 111(d) of CERCLA.

The Department notes in response that the rule is intended to be applied consistent with case law and believes that no change is necessary to reflect this in the text.

The comment also requested that the concept of recovery period be clarified to include future losses or diminution of value, as some natural resources may require a period of several years to recover to pre-exposure viability. The Department agrees with this comment, but believes that the rule adequately reflects this concept.

Another comment suggested that the definition of "recovery period" be modified to address the situation where a resource can never return to its baseline condition. The Department has not added this discussion because it believes that this situation is adequately covered by the definition.

#### § 11.14(hh) "Restoration" or "rehabilitation"

One comment suggested that the definition of "restoration" be revised so that "baseline condition" may be measured in terms of a resource's biological or chemical, as well as physical, properties. The comment maintained that limiting the measurement of baseline to the physical properties of a resource would unduly limit the injuries considered. The Department agrees with this comment and has modified the definition accordingly.

#### § 11.14(ii) "Services"

One comment suggested that the definition of "services" provide explicitly that services are not limited to human uses. The comment stated that the legislative history is clear that ecological services should be considered. Several comments recommended that the definition of "services" include explicit references to examples of intangible services.

The Department notes that the current definition does not preclude the consideration of non-human services

where the authorized official deems consideration appropriate. Human uses are a subset of services. As such, no change in this definition has been made. Further discussion of this issue can be found in the discussion of the comments to § 11.71.

#### § 11.14(jj) "Site"

One comment recommended that the definition of "site" be revised by inserting the word "discharged" to conform with section 311 of the Clean Water Act. The Department agrees and has so revised the definition.

#### § 11.14(kk) "Special resources"

See discussion of comments on "special resources" in the responses to comments in Section IV of this preamble.

#### § 11.14(ll) (now (pp)) "Surface water resources"

One comment suggested that the definition of "surface water resources" not be limited to "waters of the United States" and offered instead the phrase "waters on the surface of the earth above the saturated zone." The Department believes that the definition of "surface water resources" is adequate as it was given in the proposed rule, and has not changed the definition.

#### § 11.14(mm) (now (qq)) "Technical feasibility" or "technically feasible"

One comment suggested that an Assessment Plan or Restoration Methodology Plan, within the meaning of the definition of "technical feasibility," need not be "well known" to be feasible. The comment offered the alternative requirement that the Plan "has been demonstrated to be possible in at least one comparable project or in a feasibility study." Another comment suggested that there be some objective standard for determining whether the Plan is technically feasible; that simply requiring the authorized official to use his discretion in such a determination is too subjective.

The Department has changed this definition to delete the phrase "as determined by the authorized official." This modification was made because the authorized official acting as trustee makes the final determination on all aspects of the assessment. As such, the phrase was redundant. The Department has made no other changes to this definition. The determination of "well-known" and "technically feasible" must be made on a case-by-case basis.

#### Section 11.15 Actions against the responsible party for damages

One comment stated that § 11.15(a) appears to limit recovery under section 107 of CERCLA to damages determined in accordance with the rule, which



appears to be at a variance with the stated purpose of the rule to allow for a rebuttable presumption.

The Department did not intend to limit all recoveries under CERCLA to damages determined in accordance with this rule, and has revised the language of § 11.15 to clarify that it applies only to assessments conducted pursuant to this rule.

Several comments on this section expressed concern as to the language used to describe what damages and costs a Federal or State agency acting as trustee may recover from a responsible party. One comment held that § 11.15(a)(1)(ii) should state that damages would be allowed for "any increase in injuries that are reasonably foreseeable as a result of response actions" rather than "reasonably unavoidable," because the reasonable foreseeability test is well established in tort law. Conversely, another comment wanted this section to disallow recovery for damage from any increased injury due to response actions by governmental agencies.

The word "unavoidable" in § 11.15(a)(1)(ii) was not changed to "foreseeable" because the Department believes that any response actions undertaken by government agencies should strive to avoid additional injury to natural resources whenever possible. Damages from such "reasonably unavoidable" increases in injury resulting from response actions by governmental agencies are not excluded from damage actions, because they are indirectly due to the discharge or release and thus included under section 301(c) of CERCLA.

Several comments stated that § 11.15(a)(3)(i) should be changed so that the costs of a preassessment screen or any other part of the assessment would not be recoverable unless injury was actually found to have occurred.

As several comments pointed out, however, and the Department agrees, the responsible party is not liable for damages or any assessment costs if there is no injury. For this reason, a new paragraph, now § 11.15(c), was added to clarify that assessment costs may not be recovered if at any point in the assessment process it is determined that no injury has occurred.

Another comment maintained that the language in § 11.15(a)(3)(ii), which allows for recovery of "administrative costs and expenses reasonably necessary for, and incidental to, the assessment," might allow the recovery of undefined and therefore unlimited "incidental" costs.

The Department disagrees that the language could be interpreted as

allowing undefined and unlimited costs. The rule repeatedly states that all assessment costs must be reasonable and fully documented. This applies equally to administrative and incidental costs.

Several comments were received that stated that § 11.15 should be changed to clearly provide that recovery of any administrative, planning, or other costs necessary in the restoration or replacement of natural resources is allowed under the Clean Water Act.

The Department agrees and has changed § 11.15 to make it clear that section 311(f)(4) and (5) of the CWA allows the recovery of the reasonable and necessary costs or expenses incurred in the restoration or replacement of natural resources.

A number of comments stated that language should be added to § 11.15 to make it clear that section 107(f) of CERCLA prohibits recovery where the damages and the release have occurred wholly before the enactment of CERCLA. Other comments suggested that the applicability of this statutory limitation to the determination of baseline and recovery times be clarified, especially in the cases where releases or damages commenced before the enactment of CERCLA but continued afterwards. A few comments requested that the ceilings to liability set forth in section 107(c) of CERCLA be repeated in § 11.15.

The Department agrees that CERCLA prohibits recovery of damages where such damages and the release of a hazardous substance from which such damages resulted, have occurred wholly before the enactment of CERCLA, and has added this exclusion under § 11.24(b). Discussions of the relationship between this exclusion and the determination of baseline and recovery times have been included in this preamble in the responses to comments on §§ 11.70 through 11.73. The Department did not change § 11.15 to reflect the ceilings to liability given in section 107(c) of CERCLA because those ceilings on liability are included in, the now, § 11.15(b) of the rule.

One comment suggested that CERCLA's three-year statute of limitations be tolled on all natural resource damage claims until the final rule is promulgated, to ensure that causes of action are not lost through expiration of the limitations period. In addition, the comment contended that discovery cannot occur until the trustee has completed the Injury Determination phase of the assessment process described in this rule.

The Department disagrees with this comment. Section 112(d) of CERCLA

provides that natural resource damage actions be filed within three years after enactment of CERCLA (by December 11, 1983) or within three years of the date of discovery of the loss, whichever is later. The promulgation of natural resource damage assessment regulations is not required to initiate natural resource damage actions under CERCLA (see *U.S. v. Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982)). Shortly before expiration of the December 11, 1983, deadline, several Federal and State trustees filed suit in order to preserve their rights to recover for damages discovered before the enactment of CERCLA. Similarly, all Federal and State agencies acting as trustees who discover injury after the enactment of CERCLA should institute any damage actions within three years of the date of discovery of the loss. Of course, the definition of "discovery" is the key to determining the date by which claims must be filed.

The Department believes that discovery occurs when the authorized official knows or should have known of the injury and its relationship to the discharge or release for which recovery is sought. This approach is consistent with the prevailing common law rule relating to statutes of limitation. The underlying purpose of statutes of limitation is fairness to the defendant in precluding the plaintiff from bringing stale claims. This concern does not disappear in the context of natural resource damage actions. If, as the comment suggested, the statute of limitations does not begin to run until the Injury Determination phase is completed, the authorized official could preserve its cause of action indefinitely by unduly delaying that portion of the assessment process. The Department notes that a regulatory definition of "date of discovery" has been developed under CERCLA by EPA for the purposes of filing claims pursuant to the Natural Resource Claims Procedures (40 CFR 306.12(f)).

#### *Section 11.17 Compliance with applicable laws and standards.*

One comment questioned why only specific statutes were included in § 11.17, stating that restorations, etc., should comply with all applicable, relevant, and appropriate laws.

The Department notes that § 11.17 does require compliance with all "applicable statutory consultation or review requirements." The specific statutes listed were intended only to highlight the statutes thought most relevant to natural resource damage assessment and restoration actions.



*B. Revisions to Subpart B—  
Preassessment Phase*

*Section 11.20 Notification and  
detection.*

Several comments suggested that the On-Scene Coordinator (OSC) be required to notify the potentially responsible party at the same time as the agency acting as trustee in the event of a possible natural resource injury.

Other comments suggested that the OSC or lead agency should notify the public as well as the trustee of potential or actual injuries to natural resources.

The Department notes that the responsibilities of the OSC and the lead agency in the response action are defined by the NCP. The requirement in § 11.20(a) for notification is a restatement of the current NCP guidance, not something generated by this rule. The Department has no authority under section 301(c) of CERCLA to redirect the activities of the OSC or lead agency.

*Section 11.21 Emergency restorations.*

One comment on this section maintained that provisions for emergency restorations in the rule are redundant since emergency responses are already established under specific sections of both CERCLA and the CWA. Another comment stated that the recovery of costs for emergency restorations is improper because section 111(i) of CERCLA does not make these costs recoverable under section 107(f). The comment held that such costs would be covered by section 106(a), which refers to removal and remedial actions. As is stated in the rule, emergency restorations are meant for those limited situations where immediate action is required to avoid or reduce danger to natural resources, and where emergency response actions are determined by the trustee to be insufficient. No duplication or redundancy of effort is involved. The Department believes that emergency restorations and recovery of costs for such actions are authorized under sections 107(f) and 111(i) of CERCLA.

Several comments noted that the rule does not provide for notification or involvement of the potentially responsible party when emergency restoration might be required, even if that party has already been identified.

The Department agrees that, if possible under the circumstances, potentially responsible parties should be contacted prior to the authorized official's proceeding with emergency restoration actions. Section 11.21(b) of the final rule has been revised to so require notification when the identity of

the potentially responsible party is known.

A few comments suggested that the distinction made in § 11.21 between on-site versus off-site and restoration versus emergency response actions be eliminated in order to give trustees the flexibility to take the most appropriate action for each emergency situation. One comment stated that the terms "on-site" and "off-site" should be clearly defined.

Another comment stated that the rule should clarify that there is no restriction on actions of Federal and State trustees for any response or restoration actions, whether off-site or on-site, if such actions are taken pursuant to existing authority.

Also, one comment stated that the trustee should be allowed to take off-site emergency actions, even if on-site response actions are ongoing, if such actions are necessary to protect the natural resources.

The Department notes in response to these comments that if an agency has independent authority to take action off-site, the agency should exercise that authority. However, the emergency restoration provision of CERCLA provides no additional authority to take actions on lands or waters the agency would not otherwise have authority to take.

The Department also feels that the term "site" has been sufficiently defined in the rule to make the meaning of "off-site" and "on-site" clear, and that the distinction between these locations and between emergency restoration and response actions must be maintained to delineate the different responsibilities of responding authorities and authorized officials.

Another comment on § 11.21 disagreed with the requirement that trustees prove that emergency restoration was necessary and that restoration costs were reasonable. Still another comment requested that § 11.21 be revised to clarify that private injuries may not be included in damage assessments because private injuries are not compensable under CERCLA.

In response, the Department notes that emergency actions are an exception to the requirement that actions first be set out in an Assessment Plan and subjected to public and potentially responsible party review and comment. Because of this exception, the rule requires that the agency demonstrate that the emergency restoration was necessary and that the costs were reasonable. The fact that private injuries may not be included in assessments has been adequately addressed elsewhere in the rule.

A final comment noted that the preamble of the proposed rule refers to emergency actions as only being allowed on "land," and that this restriction does not exist in CERCLA.

The preamble to the final rule has been reworded to eliminate this restriction. The rule itself does not contain any such limitation.

*Section 11.22 Sampling of potentially  
injured natural resources.*

One comment on this section suggested that § 11.22(b)(2) should require the authorized official to sample randomly or obtain average concentrations of ephemeral conditions or materials, in order to ensure that the suspected areas of exposure are accurately represented. Another comment recommended the early identification and sampling of a suitable control area to assist in establishing baseline conditions in later phases. One comment noted that sampling requirements in § 11.22 are particularly applicable to biological resources. A final comment suggested that the phrase "that the evidence suggests have been injured" in § 11.22(b)(1) be changed to the phrase "that the authorized official believes may be injured," since little actual evidence will be available at this point.

The Department does not believe that any changes to the language of § 11.22(b)(i) are necessary. The sampling permitted in § 11.22 is meant to be the minimum necessary to prevent the loss of data on conditions that are ephemeral. Injured or dead biological resources that are perishable certainly fit into this category, as is stated in the rule. In order to minimize costs prior to the development of a clearly delineated Assessment Plan, the rule does not require potentially costly random sampling techniques or sampling of control areas during the preassessment screen. Sampling done at this stage is not intended to represent average conditions but only to preserve some evidence of contamination.

*Section 11.23 Preassessment screen—  
general.*

A majority of the comments approved of the basic concept of the preassessment screen, stating that it is an important and useful step in the assessment process. Most of the suggestions were in the form of recommended modifications to various stages of the screen rather than disagreements with the general concepts involved. One comment endorsed the idea of a preassessment screen, but found the existing one to have a positive



determination threshold so low as to make the screen meaningless.

A few comments mentioned that the preassessment screen is one place in the rule where the opportunity should be taken to encourage the authorized official and the responsible party to come to a settlement and thus avoid the costs of litigation.

The Department concurs that a mutually agreed upon settlement is preferable to expensive litigation. It has provided opportunities for settlement discussion by mandating involvement of the potentially responsible party at the beginning of the Assessment Plan phase. The preassessment screen, however, is meant to be an early evaluative stage in which the authorized official initially determines whether any assessment is appropriate for a particular site. During the preassessment screen basic information is still being gathered. It is thus too early to formally require a consideration of settlement, although such considerations at this stage are not precluded by the rule.

One comment suggested that there be a formal record of the decision made at the end of the preassessment screen to proceed or not proceed with an assessment, as well as a notice of intent to conduct a preassessment screen and to develop an Assessment Plan.

The rule already requires that a written Preassessment Screen Determination (§ 11.23(a)) be made and included in the Report of Assessment, that a Notice of Intent to Perform an Assessment be sent to all identified potentially responsible parties prior to the development of the Assessment Plan, and that all authorized officials sharing responsibility for the affected natural resources coordinate their efforts at the beginning of the Assessment Plan phase. A notice requirement for the preassessment screen itself would be inappropriate, because it is the most preliminary stage of agency involvement.

Another comment maintained that the public should be informed at this stage of the likelihood of injury to natural resources and of the decision as to whether an assessment will be conducted.

Prior to the formulation of the Assessment Plan, decisions on proceeding with an assessment are generally based on questions of jurisdiction, statutory authority, and internal agency authority and on the severity of the potential for natural resource injury. Public involvement is best utilized at the Assessment Plan phase when such administrative and internal issues have been resolved, and when preliminary decisions on the scope

and extent of the assessment have been addressed to some degree.

Suggestions from the comments on changes or additions to the criteria set forth in § 11.23(e) were numerous. Some comments held that the criterion that the authorized official make a judgment as to whether the planned or ongoing response activities would sufficiently remedy injury was either too vague, too difficult to do, or too restrictive.

The Department feels that it is not unreasonable to require that the authorized official take into account efforts to remedy the injury prior to preparing to do an assessment. On the other hand, the determination of whether planned response actions will "sufficiently remedy" any potential injury is left to the discretion of the authorized official to be decided on a case-by-case basis, due to the wide variety of situations that may arise.

Some comments maintained that confirmation of exposure rather than probability of exposure should be required in the preassessment screen. Others felt that a preliminary determination of resources and services impaired was appropriate at this point, with an emphasis on the identification of the services provided by resources rather than on the resources themselves.

The Department feels that requiring the confirmation of exposure within the preassessment screen would add considerably to the scope and complexity of the screen. The placement of the confirmation of exposure as a formal requirement early in the development of the Assessment Plan phase allows the results to be reviewed sufficiently early enough to avoid any costly assessments being initiated. In a similar manner, a preliminary identification of services in the Assessment Plan phase, rather than the preassessment screen, will direct those performing an assessment toward cost-effective decisions without unnecessarily adding to the burden of the information necessary for the Preassessment Screen Determination.

A large number of comments on the criteria in § 11.23(e) had to do with concerns that assessments not be continued beyond the preassessment screen where costs potentially exceeded benefits. Some wanted a specific weighing of potential costs versus potential benefits at this point in the assessment process. Others requested that the type of preliminary economic analysis required in the Assessment Plan be moved up to the preassessment screen. Conversely, some comments objected to the criterion in the rule that the authorized official determine that data sufficient to pursue an assessment

are readily available or obtainable at a reasonable cost, on the grounds that neither the cost nor the availability of data should prevent an assessment from being performed. One comment pointed out that the definition of "reasonable cost" provided in § 11.14(ee) is inappropriate in the preassessment screen, since it is too early in the assessment to determine incremental benefits.

The Department acknowledges the concern that some emphasis be given in the preassessment screen to the potential magnitude of the damages and the question of whether it is worthwhile to continue. On the other hand, the rule purposely minimizes the cost of all assessment related efforts that precede the Assessment Plan. The preassessment screen is not meant to include extensive analysis, economic or otherwise. Any decisions made in the Preassessment Screen Determination regarding reasonable costs will be reevaluated in the Assessment Plan phase and throughout the assessment. In fact, one of the purposes of the Assessment Plan phase is to estimate costs, as a truly accurate estimate cannot be made until a plan is established. However, the Department has attempted to include an early consideration of the costs of doing an assessment versus the benefits by requiring that the authorized official look at the availability of data and the costs of obtaining data. The Department does not feel that this requirement at an early stage of the assessment process is overly restrictive. It has changed the wording of § 11.23(e)(4) slightly, from "Data sufficient to pursue an assessment are readily available or can be obtained at reasonable cost" to "Data sufficient to pursue an assessment are readily available or likely to be obtained at reasonable cost" in order to reflect the fact that it may be too early in the assessment process to decide with absolute certainty whether such data can be obtained at reasonable cost or not.

A number of comments requested that § 11.23 include a provision that no assessments be conducted beyond the preassessment screen for "de minimus" levels of discharges or releases, in order to avoid trustees being placed in the "difficult position of conducting data collection merely to document the nonexistence of a damage." Some comments suggested that such "de minimus" quantities be equated to establishing a level for assessing injuries in natural resource damage assessments.



The Department does not consider the setting of "de minimus" quantities of an oil or hazardous substance discharged or released as either appropriate or necessary within the context of this final rule. This rule provides procedures for seeking compensation for injuries to natural resources resulting from a discharge or release. The rule defines injury as a measurable adverse change in the chemical or physical quality or viability of a resource. It is inappropriate to require a particular quantity of a discharge or release to identify a potential injury in the preassessment phase as a criterion to be met before proceeding with an assessment. It cannot be determined whether such a predetermined quantity would result in a measurable adverse change. The Department does not consider it necessary to provide additional guidance on the question of the quantity of oil discharged or hazardous substance released since extensive guidance has already been provided in §§ 11.24 and 11.25 to facilitate a Preassessment Screen Determination.

The authorized official acting as trustee is required to examine critically all aspects of the situation, including the quantity and concentration of the discharged oil or released hazardous substance, in order to determine if the potential for injury exists and can be assessed at a reasonable cost. This requirement will ensure that assessments will not be done for discharges or releases where the potential for injury and reasonable assessment costs are very low.

Additional comments on § 11.23 dealt with coordination between this rule and other response activities. Many comments approved of the requirements in § 11.23(f) that preassessment screen activities be coordinated with response actions and other similar processes whenever possible. Some thought that natural resource damage assessment procedures should be combined with currently existing Hazard Ranking procedures, or in some other way be even more closely coordinated with remedial investigations and feasibility studies. Others thought that the preassessment screen should be delayed until the Remedial Investigation is complete.

The Department notes that natural resource damage assessments and response actions, while closely coordinated, do serve different purposes and thus cannot be fully combined. However, the Department has attempted to integrate these two activities to the maximum extent practicable. As for

disallowing any activities from taking place until remedial investigations are complete, the Department feels that this would be overly restrictive, given the current statute of limitations in CERCLA. The rule purposely avoids specifying particular dates by which specific steps should be taken because of the wide variety of assessment situations that may be encountered.

A final group of comments on § 11.23 recommended that this section be amended to include identification of the reasonable and necessary costs that may be incurred in the preassessment phase. The Department agrees with this comment and has clarified the issue of allowable costs by adding § 11.23(g).

#### *Section 11.24 Preassessment screen—information on the site.*

A number of comments pointed out that damages occurring to natural resources wholly before the enactment of CERCLA on December 11, 1980, are specifically excepted from liability in section 107(f) of CERCLA, and that this exception should be listed with the others given in § 11.24(b)(1) of the rule. The Department concurs and has revised § 11.24(b) accordingly.

Another comment suggested that the exception to liability for federally permitted releases given in § 11.24(b)(1) should clearly state that the meaning of "federally permitted releases" is as it is defined in CERCLA. The Department agrees that this should be explicitly stated, and has inserted a reference to the CERCLA definition into this section and into § 11.71(g).

One comment suggested that a new subsection be added to § 11.24 to expressly state that injuries to natural resources resulting from mining or ore processing activities conducted in compliance with a State-issued permit or other applicable Federal or State law are excluded from liability under CERCLA. The Department responds that the only exclusions to CERCLA liability are those specifically set forth in the statute. Further discussions on how mining activities may be treated under this rule, particularly in terms of establishing a baseline and discerning damages that have occurred wholly before the enactment of CERCLA, are included in the responses to comments on §§ 11.70 through 11.73.

#### *Section 11.25 Preassessment screen—preliminary identification of resources potentially at risk.*

One comment stated that § 11.25 should explicitly state that the potentially responsible party should not be required to pay preassessment costs

if no natural resource injury is identified during the preassessment screen.

As stated earlier, the Department agrees and has revised § 11.15 to explicitly state that the potentially responsible party shall not be responsible for any assessment costs if injury is not demonstrated.

An additional comment on this section held that the rule allowed the assessment of resources not covered by CERCLA, because in § 11.25, and in other places throughout the rule, the term "resources" is used instead of "natural resources." For the same reason, the comment objected to the fact that in § 11.25(b) the authorized official is directed to identify "areas where exposure or effects may have occurred" without a restatement of the limitation that no damages may be recovered for private losses.

The Department has amended the definition of "natural resources," in § 11.14(z), to clarify that the term "resources" is equivalent to the term "natural resources." Also, the Department believes that, given the emphasis throughout the rule and preamble on the fact that "private" losses are not within the scope of this rule, further clarification as to the areas where exposure or effects may have occurred is unnecessary; therefore no change in this regard has been made.

#### *C. Revisions to Subpart C—Assessment Plan Phase*

##### *General Comments—Assessment Costs*

Some comments stated that the proposed rule did not sufficiently ensure that trustees will use cost-effective assessment methodologies, nor that the final cost of the assessment will be reasonably related to the damages being assessed. One comment argued that baseline condition measurement and pathway analysis requirements in particular will be too costly in many circumstances. Some comments recommended incorporating techniques into the assessment process to evaluate the need and practicability of each subsequent step to ensure that only appropriate measurements will be made. In addition, one comment suggested that greater clarification is needed on what costs associated with performing an assessment a responsible party can be required to pay.

The Department is committed to ensuring that, under this rule, each assessment is conducted at a reasonable cost, and that cost-effective assessment methodologies are used. The language of § 11.14(ee), the definition of "reasonable costs," has been revised to ensure that



the cost of an assessment will be reasonably related to the damages being assessed. Also, § 11.31(a)(2) now states that an Assessment Plan will be sufficiently detailed to evaluate whether the assessment will be conducted at a reasonable cost. In addition, §§ 11.23, 11.30, and 11.60 have been revised to ensure that the preassessment, Assessment Plan, Injury Determination, Quantification, and Damage Determination phases of an assessment are undertaken in a cost-effective manner. These sections now state that at each phase, the authorized official will choose the cost-effective means that achieve the objective of that phase. In addition, language has been added to these sections clarifying what costs associated with performing an assessment can be part of a damage claim.

One comment asserted that the first several years of the implementation of the rule will involve experimentation regarding assessment methodologies, and that assessment costs will therefore be quite high. Government, rather than responsible parties, the comment stated, should pay at least part of assessment costs during this learning period. Conversely, several comments stated that the cost of new research required to meet the acceptance criteria, indeed any research needed to assess injury and determine damage, should be borne by the responsible party.

The Department points out that only those costs directly associated with deriving a dollar value for damages, as provided in this rule, for a particular injury are considered "reasonable costs." CERCLA also mandates that the "best available procedures" be used to assess natural resource damages. Responsible parties should not be required to pay for new developmental research necessary to meet the acceptance criteria, or any other research. On the other hand, CERCLA does provide that the liability of a responsible party includes assessment costs, therefore, authorized officials acting as trustees are statutorily authorized to include all reasonable costs of performing an assessment as part of a damage claim.

Some comments suggested that the assessment process be modified so that a trustee could present a demand for the estimated costs of assessing damages before the assessment began. These comments argued that, if such a modification is not made, trustees may be reluctant to determine, during the preassessment screen, that an assessment is justified, because the

trustee might fear having to assume some or all of the assessment costs.

The Department notes that § 11.32(d) allows potentially responsible parties to participate in the implementation of all or part of an approved Assessment Plan. Where this participation is appropriate, costs of performing the assessment can be borne by potentially responsible parties rather than the authorized official acting as trustee. Aside from this alternative, however, reasonable assessment costs incurred by an authorized official acting as trustee can be recovered from a responsible party only as part of a damage claim. A damage claim must be presented after damages have been assessed. Therefore, a responsible party cannot be required to pay assessment costs prior to an assessment.

#### Section-by-Section Comments

##### Section 11.30 Assessment Plan—general.

In response to comments requesting greater clarification of what assessment costs a responsible party can be required to pay, subsection (c) has been added detailing the reasonable and necessary costs that are eligible in the Assessment Plan phase.

In response to comments requesting that costs not specifically allocable to the damage assessment not be borne by the responsible party, paragraph (c) also requires that regular activities of the authorized official be excluded from the assessment costs and that appropriate records and documentation be provided for eligible assessment costs.

##### Section 11.31 Assessment Plan—content.

One comment stated that the proposed text, in § 11.31(a)(1), implies that only methods and approaches specifically identified in the Assessment Plan can be used, even though subsequent information may suggest that other methods are preferable. This restriction, according to the comment, would require that an Assessment Plan cover all possible contingencies, and thus would not convey information about those methodologies that are most likely to be used. The comment also stated that § 11.31(a)(2) implies that the trustee can demonstrate cost-effectiveness within the Assessment Plan. The comment recommended that the language be changed because data available during this stage of the assessment are not sufficient to demonstrate cost-effectiveness.

The Department agrees with the comment, and for the purposes of clarification both of the recommended

textual changes have been made. Section 11.31(a)(1) now reads: "shall identify . . . methodologies that are expected to be performed during the Injury Determination, Quantification, and Damage Determination phases . . ." Section 11.31(a)(2) has been modified to read: "whether the approach used for assessing the damage is likely to be cost-effective . . ."

Several comments stated that the Quality Assurance Plan requirements in § 11.31(c) are too limited in scope, focusing almost exclusively upon sampling and laboratory analysis. These comments maintained that the Quality Assurance Plan requirements fail to provide standards to maintain quality assurance in the many other aspects of the assessment, such as modeling, baseline determinations, service quantification, and economic valuation. One comment stated that the Plan failed to provide expressly for a common reviewer of all Quality Assurance Plans as EPA requires in the NCP (40 CFR 300.68(k)).

The Department does not intend to mandate EPA approval of each Quality Assurance Plan. However, authorized officials are encouraged to seek advice and assistance, when appropriate, from EPA in the development of the Quality Assurance Plan. The Assessment Plan itself is intended to function as a type of "quality assurance plan" for the entire assessment. Where specific Quality Assurance Plan requirements have not been previously developed for a phase of the assessment, the Assessment Plan should contain sufficient detail to allow review, as mandated in § 11.32(c)(1), of the accuracy of all procedures expected to be used in the assessment process.

##### Section 11.32 Assessment Plan—development.

Several comments on this section stated that a comment period of thirty days may not always be sufficient to respond to an Assessment Plan, especially when the Plan is unusually complex.

The Department notes that the proposed rule provided for a comment period of "at least 30 calendar days." The final rule has been modified to explicitly allow the authorized official to designate a comment period of longer than 30 days when appropriate. In general, however, the authorized official should choose a time period that allows adequate comment, yet still ensures that the damage assessment process proceeds in as timely a fashion as possible.

One comment requested clarification of the lead authorized official's identity



and role. The comment maintained that it was possible to construe § 11.32(d) as saying that a potentially responsible party could be designated as the lead authorized official.

The Department points out that § 11.32(a) states that the lead authorized official must be chosen from among the trustees with jurisdiction over one or more of the potentially injured natural resources. The Department notes that these trustees are in all cases representatives of Federal or State agencies. However, to avoid any possible confusion, a revision has been made to the definition of "authorized official" in § 11.14(d) to clarify that only Federal or State officials may act as authorized officials. There may be, however, a few instances where Federal or State agencies are both the trustee agency and the potentially responsible party. In those instances, and only in those instances, the lead authorized official could also be one of the potentially responsible parties. Such dual roles by government agencies have been judicially recognized (see *U.S. v. Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985)).

The same comment requested clarification of the lead authorized official's role, claiming that as final arbitrator of all disputes among authorized officials, and given the large number of critical decisions to be made by them, the lead authorized official obtains a disproportionate amount of authority.

The Department does not intend that the designation of a lead authorized official relieves other authorized officials of their responsibility to protect and manage one or more of the affected natural resources. The Department encourages the participation and consultation of all authorized officials regarding all aspects of the assessment. All affected authorized officials should be thoroughly consulted before the lead authorized official makes any of the critical decisions called for in the assessment. The rule states that the lead authorized official acts as final arbitrator only if a dispute among the authorized officials arises, and only if consensus cannot be reached. Thus, the Department believes that the rule provides the lead authorized official with special authority only when necessary, and that this does not constitute a disproportionate amount of authority.

This comment also expressed concern that a lead authorized official may not be designated in a timely fashion, and requested that designation "be made within 60 days following notice of injury."

The Department believes that the issue of timely designation is already addressed by the rule. Section 11.32, pre-development requirements requires designation prior to the development of the Assessment Plan.

Some comments suggested that § 11.32(a)(1)(ii) was not comprehensive enough in outlining the conditions by which a lead authorized official would be chosen if consensus among trustees could not be reached. In particular, it was stated that paragraph (C) was too restrictive because it referred to natural resources subject to the "administrative jurisdiction of a State agency acting as trustee."

The Department intended only to reflect the State trusteeship as defined by CERCLA, and therefore, to clarify this point, has replaced that phrase with one that refers to "all other natural resources for which the State may assert trusteeship."

Several comments stated that the 30-day period provided for potentially responsible parties to respond to the Notice of Intent to Perform an Assessment is inadequate, and requested that a 60-day period be specified.

The original period of at least thirty days was provided in the proposed rule in an attempt to minimize the impact of the requirement on the timely progress of the assessment. Language has been added to the final rule to clarify that the authorized official may designate periods longer than 30 days in which potentially responsible parties may respond to the notice. Because this period precedes the development of the Assessment Plan or any other assessment actions, the Department believes that a mandatory 60-day period might unnecessarily delay the damage assessment process in some cases.

Other comments requested that the Notice of Intent to Perform an Assessment be sent to interested members of the public, not just potentially responsible parties. Further, they requested that the Notice's invitation to potentially responsible parties to participate in the development of the type and scope of the assessment and in the performance of the assessment be extended to members of the public as well.

While the Department recognizes the importance of participation by both interested members of the public and potentially responsible parties in the natural resource damage assessment process, it does not consider their responsibilities or roles identical. The public has a right to review and comment on decisions at appropriate points in the process. Indeed, members

of the public serve a valuable role by providing input, raising concerns, and performing critical reviews. The public's role, however, is not meant to supplant that of authorized officials acting as trustees, who bear a direct obligation to protect the public's interests. Federal and State agencies acting as trustees are by definition "entrusted" with responsibility for protecting and managing public resources. Public participation can enhance and complement the work of authorized officials acting on behalf of the public interest, but it cannot substitute for the authorized officials' performance of their statutory responsibilities.

The role of potentially responsible parties, on the other hand, is distinct from that of the public or the authorized official acting on behalf of the public. Although the rule is designed to encourage the cooperation of potentially responsible parties in developing and implementing assessment plans, the potentially responsible parties are, in fact, potential defendants. In addition, potentially responsible parties are ultimately responsible not only for paying the assessed damages, but for the costs of performing the damage assessment. The Department believes that participation of potentially responsible parties in Assessment Plan development and performance protects those parties' interest in a cost-effective approach and promotes an amicable settlement of natural resource damage claims. Therefore, while the participation of potentially responsible parties and members of the public as outlined in the rule is not identical, it is equitable, given the potentially responsible parties' status as potential defendants and the authorized official's actions on behalf of the public.

Some comments objected to the implication of § 11.32(a)(2)(iii) that where several potentially responsible parties are involved, the parties must select one and only one representative. Comments indicated that this restriction is inappropriate where potentially responsible parties believe their interests are in conflict. They suggested that the rule be more flexible and allow for more than one representative if, for example, it is established that more than one class of potentially responsible parties exists.

The Department maintains that a single representative is preferable, but agrees that in some circumstances more than one representative may be appropriate. Therefore, the rule has been changed to address this possibility. Any deviation from the designation of a single representative should be made at



the request of the parties and with the concurrence of the authorized official.

One comment expressed concern that the language of proposed § 11.32(a)(2)(ii) suggests that the trustee's ability to proceed against one or several parties depends on the number of potentially responsible parties or their unavailability, rather than upon the indivisibility of the harm.

The Department did not intend to suggest any deviation from the case law governing joint and several liability under CERCLA. The language of § 11.32(a)(2)(ii) must be read in the context of governing case law.

Some comments requested that the Report of Assessment include not only comments received on the Assessment Plan, § 11.32(c)(2), but all comments received during all phases of the assessment. Further, they requested that the trustee be required to respond on the record to those comments.

The Department notes that the proposed rule required comments on the Assessment Plan and any Restoration Methodology Plan to be made part of the Record of Assessment. Because modifications to the Assessment Plan are subject to public review and are considered part of the Assessment Plan, any modifications to the Assessment Plan would also be included in the Report of Assessment. The Department agrees that authorized officials should be required to respond to all significant comments on the record and has changed §§ 11.32(c)(2) and 11.82(e)(2)(ii) to reflect this requirement. Whenever the rule requires public review and comment, notice of availability of documents to review should be accomplished in the manner generally used by the Federal or State agency to provide for public notice. It is expected that this would include publication in a paper of general circulation and use of the *Federal Register*, where appropriate.

Many comments supported the concept embodied in § 11.32 of allowing potentially responsible parties to participate in the implementation of the Assessment Plan. Other comments, however, were in disagreement with this provision. Still others agreed that potentially responsible parties should be eligible for participation, but should not be allowed to make the decision to opt for participation. Apparently, there was confusion over the phrase "At the option of any potentially responsible party."

The Department meant to emphasize that a potentially responsible party could not be required to participate if it were unwilling to do so. The Department's intention has always been that the decision to allow or not allow potentially responsible parties to

participate in the implementation of the Assessment Plan should rest solely with the authorized official, or the lead authorized official, when appropriate. Furthermore, a decision to allow such participation should only be made when the authorized official believes that a fair and accurate damage assessment will result from the potentially responsible party's participation and will be ensured through adequate direction, guidance, and monitoring by the authorized official. Section 11.32(d) has been modified to clarify that the authorized official, not the potentially responsible party, makes this decision, and that the decision and reasons supporting it are documented in the Assessment Plan.

The Department emphasizes that any and all actions taken by potentially responsible parties to implement an Assessment Plan occur under the ultimate approval and authority of the authorized official acting as trustee. The potentially responsible party functions in a strictly ministerial role. The final choice of methodologies rests solely with the authorized official.

In addition to these comments, it was requested that trustees share data with potentially responsible parties as soon as it is available and allow potentially responsible parties the opportunity to obtain split samples.

While the Department supports the suggestion regarding split sampling, it does not support an ad hoc approach to sharing data. Section 11.31(a)(4) has been added to specifically provide that data will be made available in a standardized manner as part of the Assessment Plan, providing sufficient opportunity for all interested parties to comment and review.

One comment stated that there are several points in the assessment procedures at which the trustee may end the assessment, and that it should be made clear that this decision to end the assessment is intended to be the final administrative action for the purposes of administrative or judicial review.

The Department agrees that a negative determination at any of the crucial steps, properly reflected in the Report of Assessment, would in most cases constitute final agency action.

Comments requested that administrative appeals processes and an oversight function be incorporated into the rule, particularly at the Assessment Plan phase.

The Department believes that CERCLA does not contemplate such procedures and that regulatory imposition of them is both unwise and unnecessary. Proper adherence to the requirements of this rule can only

appropriately be determined on a case-by-case basis by the agencies acting as trustees, the potentially responsible parties, and the judicial system.

#### *Section 11.33 Assessment Plan—deciding between a type A or type B assessment.*

This section was proposed on May 5, 1986 (51 FR 16636), in conjunction with the type A rule. Comments on this section will be discussed in the final type A rule.

#### *Section 11.34 Assessment Plan—confirmation of exposure.*

Several comments supported the proposed rule's approach of making confirmation of exposure an explicit step of the Assessment Plan phase. The Department has made no changes in this section; but a further discussion on this issue can be found in section III-B of this preamble.

#### *Section 11.35 Assessment Plan—Economic Methodology Determination.*

One group of comments strongly supported the rule that damages to natural resources be valued at the lesser of restoration or replacement costs; or diminution of use values. These comments supported this concept because it represents an appropriate adaptation of the common law rule and it promotes a rational allocation of society's assets. One comment stated that damage amounts would be used to compensate for the injury by restoring or replacing the natural resources, regardless of the method used to determine the damages, and that, until society can determine more accurately the value of natural resources and quantify their damage, using the lesser of the two methods is the fairest solution.

Another group of comments, however, argued that the guidelines for choosing valuation methodologies in the proposed rule are inconsistent with both CERCLA and its legislative history because both section 107(f) and the Senate report (S. Rep. No. 96-848, 96th Cong., 2d Sess. (1980)) state that the measure of natural resource damages is not limited to restoration or replacement costs. The comments interpreted this statement to mean that restoration or replacement costs are the minimum damages that trustees may recover.

The Department believes that a more reasonable interpretation of section 107(f) and the Senate report language is that the alternative methodologies for measuring damages should not be limited to restoration or replacement costs, but may also include other



methodologies (i.e., diminution of use values). Furthermore, it is clear that the general common law measure of damages is the lesser of diminution of use values and restoration or replacement costs. No comment contended that this is not the general common law rule. In the absence of clearly expressed Congressional intent to deviate from this common law rule for purposes of natural resource damage assessments, it must be presumed that Congress intended to incorporate traditional notions of damage measurement into the natural resource damage assessment process. Congress stated in section 301(c)(2) of CERCLA that natural resource damage assessment regulations "shall take into consideration" replacement value, use value, and restoration value. Congress did not indicate in this section how these differing valuation methodologies were to be considered.

Some comments further argued that because diminution of use value will nearly always be less than restoration or replacement costs, damage awards will rarely be sufficient to enable trustees to restore or replace injured resources.

The Department notes that while the diminution of use values may in some instances be less than restoration or replacement costs, it does not follow that injured resources or the services provided by the resources will not be restored or replaced. Regardless of which valuation methodology is chosen, this rule requires that all funds collected from the settlement or award must be used for restoration or replacement. In addition, Federal or State agencies are not precluded from supplementing damage funds with other monies to restore, replace, or enhance the injured natural resource. Also, it is important to remember that the natural resource damage assessment regulations are intended to measure residual damages. The natural resource at issue has, in the majority of cases, already been the focus of a cleanup or a remedial action. This rule is intended only to assess what compensation, if any, is necessary to account for residual damages.

One comment noted that § 11.35(c)(1) requires the trustee to "estimate and document the costs of restoration or replacement and the benefits gained by restoration or replacement . . ." The comment questioned the need and authority for requiring this analysis. The Department notes that the analysis in § 11.35 is required to allow the authorized official acting as trustee to determine whether: restoration or replacement costs; or the diminution of

use values will be the measure of damages. As stated above, this final rule follows the general common law definition of damages, i.e., that damages are the lesser of: restoration or replacement costs; or a diminution of use values. The Department believes that because CERCLA does not change this general common law definition of damages, it has authority to require an analysis to implement this definition. Without the analysis required in § 11.35, the authorized official would not be able to select the proper measure of damages to use in the Damage Determination phase of the assessment.

Several comments suggested that in order to prevent depletion of resources through injury, restoration costs should be favored over replacement costs whenever restoration is possible. There is no indication in CERCLA or its legislative history that Congress intended to favor restoration costs over replacement costs as a method of valuation of natural resource injury. Therefore, this rule contains no bias for restoration costs or against replacement costs as a measure of damages, other than the requirement that the most cost-effective measure be chosen.

Several comments objected to the requirement in § 11.35 that the acquisition of replacement lands for Federal management be selected only as a last resort, arguing that in many cases replacement could be the most direct and cost-effective method.

The Department has retained this provision as proposed because of the need to restrict new Federal acquisitions only to those absolutely necessary to satisfy the mandates of the Federal management agency. This issue is discussed further in Section III E of this preamble.

Some comments suggested that, while it might be possible in some cases to make the choice between restoration or replacement costs and a diminution of use values at this stage, it might not be possible in all cases. In some instances, the comments suggested, trustees might have to perform the analyses required in §§ 11.81 and 11.83 prior to making this decision.

The Department notes that the purpose of the Economic Methodology Determination is to decide upon the appropriate measure of damage, not the exact amount of the damage claim. The amount of the damage claim is determined by the use of the methods listed in §§ 11.81 and 11.83. The Economic Methodology Determination is meant to derive only an order of magnitude estimate of restoration costs and lost use values. The purpose of this

rough estimate is to help structure the Quantification and Damage Determination phases of the assessment. Selection of restoration costs or use values based on the Economic Methodology Determination in the Assessment Plan phase rather than the extensive analysis of each of the methodologies in the Damage Determination phase avoids the expense of performing two major pieces of expensive analyses, and is in keeping with the statutory requirements allowing only the reasonable costs of an assessment to be claimed by authorized officials acting as trustees. The Department further notes that this initial decision, or its underlying analysis, may be modified as new information is obtained. The authorized official is given the explicit discretion to modify the Assessment Plan at any point. This includes modifications of the Economic Methodology Determination.

The Department expects that the close consultation between resource specialists and economists required by this final rule will mitigate the need for frequent revisions to the Economic Methodology Determination. Because of the purposes served by the Economic Methodology Determination and the authorized official's ability to modify the initial decision, this comment has not been incorporated in the final rule.

One comment suggested that because the Economic Methodology Determination may not be completed, or may be modified, before the Assessment Plan has been developed and subjected to public review and comment, that a separate review and comment period was necessary.

The Department agrees with the comment's suggestion that when the determination is made or is modified after approval of the Assessment Plan, that it should be considered a significant modification of the plan, and thus be subject to a formal review and comment period. Section 11.32(f) has been revised accordingly.

#### *Special Resources*

Many comments were received on special resources. These comments are addressed in Section IV of this preamble.

#### *D. Revisions to Subpart D—Type A Assessments [Reserved]*

#### *E. Revisions to Subpart E—Type B Assessments*

#### *General Comments*

A number of comments were received on the type B assessments in general. Most of these have been covered in



responses to comments on specific sections of the rule.

One comment suggested specifying the kinds of costs that are recoverable for activities taking place throughout the assessment. The Department concurs and has addressed this issue by adding a new paragraph to §11.60, as well as to §§11.23 and 11.30.

Another comment asked that, if there is no response action taken, can there be compensation for injuries that might have been taken care of if a response had been taken?

The rule allows recovery for injuries that are residual to any response action, plus any loss of use of the resource from the time of the discharge or release. Thus, if there is no remedial or other response action planned or taken, then recovery may be based on the total extent of injury.

One comment expressed the opinion that, though permitted releases are excluded from the quantification process, there is no guidance for the situation in which a permitted release is accompanied by the release of unpermitted constituents.

In response, the Department agrees that the rule excludes injuries resulting from permitted releases. Therefore, in the situation described in the comment, a damage claim should only include the injuries resulting from the unpermitted releases.

One comment recommended that each phase of the assessment should be preceded by an evaluation of the practicality and need for the step about to be performed.

The Department notes that such an evaluation is present in each step, with the exception of between the Quantification and Damage Determination phases. Since these phases are expected to overlap in scope and time, there is no required review between them.

#### *Section 11.61 Injury Determination phase—general.*

Many comments on the Injury Determination phase supported the requirement that injury be linked to the release, and pointed out that the trustee has no authority to "presume" causation. These comments concurred with the Department's position that speculative damages are not within the scope of CERCLA.

Other comments agreed with the determination, in §11.61(e)(3), that if there is no injury, there will be no further assessment actions taken. These comments asserted that the potentially responsible party should not be liable for assessment costs when there is no finding of injury.

To make sure that this position is clear, the Department has added language in §11.15 to explicitly state that there is no recovery of costs where there is no injury.

One comment on the general approach to injury determination stated that methodologies should be limited to those that are most realistic and that can be best related to the lost services to ensure that the methodology chosen is the one most scientifically appropriate, not just the one that is the cheapest.

The Department notes in response that cost-effectiveness assumes a set level of benefits to be derived from the methodology to be used.

Some comments stated that the rules for determining injury are based only on effects on humans, whereas effects on other parts of the environment should also be considered.

The Department points out that many of the measures of viability of a biological resource—one of the adverse changes that can constitute a natural resource injury—are independent of effects on humans.

One comment asserted that the definition of injury should include intangible injuries, such as changes in aesthetics of affected landscapes.

In general, the Department believes that since the result of a damage assessment for injury to a resource can have the force and effect of a rebuttable presumption, an injury should be defined strictly as a measurable adverse change in the physical, chemical, or biological properties of a resource. "Intangible injuries" would, by definition, be impossible to measure accurately, and the assessment of damages for such injuries should therefore not qualify for a rebuttable presumption.

One comment stated that nowhere in the rule is the injury caused by the cumulative effects of oil and hazardous substance discharges or releases discussed, and that responsible parties should be required to compensate for damages to natural resources that are injured as a result of a series of discharges or releases. The comment further stated that under the proposed rule, each of the discharges or releases will be evaluated separately, and if a single discharge or release does not injure resources, then no damages can be sought.

The Department notes in response that neither CERCLA nor the rule defines "cumulative releases" apart from other types of discharges or releases. By using guidance provided in this rule, the authorized official determines the time, duration, and

frequency of any specific incident involving a discharge or a release, and also identifies "any potentially responsible parties." The language used in the rule allows assessment of damages due to cumulative releases, if the releases satisfy the statutory requirements of CERCLA.

#### *Section 11.62 Injury Determination phase—injury definition.*

##### *General Comments*

One comment stated that the proposed rule for the Injury Determination phase was not sufficiently tied to the requirement that an injury is a "measurable adverse change," and that many of the "standards" and methods set forth in §§11.62 and 11.63 do not require any "real world" injury, but instead rely upon hypothetical models or laboratory tests. The comment stated that the law does not award damages for remote or speculative injury, and therefore urged the Department to amend the rule and the acceptance criteria to ensure that only actual and not theoretical injury will be measured.

The Department disagrees that the rule for injury determination is not sufficiently tied to the definition of injury. The injury tests for non-biological resources use established standards that have been scientifically tested and publicly evaluated prior to adoption by health and environmental agencies. The injury tests for biological resources were determined after an exhaustive literature search and review that documented the "real world" relevance of the biological responses listed in this rule.

One comment felt that each test for injury determination was written so stringently that any change whatsoever establishes an injury to the natural resource in question.

The Department disagrees that this is the case. The injury definitions do not measure insignificant changes. The definitions rely on changes which have been demonstrated to adversely impact the resources in question, or services provided by those resources.

One comment stated that some of the criteria selected for determination of injury—even though based on actual measurement—may not be sufficient to establish an actual injury. For example, standards established under the Clean Air Act and Clean Water Act are intended to guard against injury to human health and the environment. The Clean Air Act requires that a margin of safety be included in every standard. Exceeding these standards, according to



the comment, does not necessarily entail an actual injury. This comment also stated that the use of these standards in the assessment without reference to baseline conditions at the site is meaningless. If the standards were exceeded before the release, the comment stated, they cannot usefully serve as an indicator of an injury stemming from the release.

The Department recognizes that these standards have incorporated a margin of safety. However, this margin of safety addresses the uncertainties involved in determining the most sensitive use of the resource and to account for the National variability in the conditions of the resource. For these reasons the Department believes that exceedence of these standards adequately reflects the occurrence of an injury to a natural resource; however, the Department notes that compensation for the injury is based on site-specific changes from baseline.

One comment stated that where no standards or criteria exist, the rule should include methods for, or encourage the development of, "no effect" levels based on existing data. Trustees could then compare existing conditions at the point of service delivery to the "no effect" level to determine whether, and the extent to which, the service flow has been interfered with.

The Department has not included methods to determine "no effect" levels based on existing data" in this final rule. This would be contrary to the mandate in § 301(c) of CERCLA to determine the "best available procedures" for inclusion in this rule.

*Sections 11.62(b) Surface water resources and 11.62(c) Ground water resources.*

Many comments opposed the use in § 11.62(b)(1)(iii) of water quality criteria developed under section 304(a)(1) of the Clean Water Act to define injury to surface water. They argued that § 11.62(b)(1)(iii) should be more explicit in indicating that water criteria for human health are not applicable when the surface water is not used for a water supply.

The Department believes that these comments may have misinterpreted the proposed rule. The injury definition which is maintained in this final rule in § 11.62(b)(1)(iii) states that injury occurs when concentrations in excess of "applicable criteria" are measured "in surface water that before the discharge or release met the criteria and is a committed use, . . . as a habitat for aquatic life, water supply or recreation" (emphasis added).

Several comments noted that under § 11.62(c)(1)(iii), applicable water quality criteria under section 304(a)(1) of the CWA are cited. Comments suggested: that these criteria are not fully applicable to ground water (the aquatic life criterion has no pertinence to ground water since ground water does not support aquatic life); and that the human health criterion is inapplicable to ground water with the exception of the component accounting for consumption of fish and shellfish. The Department notes that the definition given in § 11.62(c)(1)(iii) recognizes that the base flow of streams and a major portion of water in lakes and marshes is supplied by ground water. Thus, the CWA criteria are applicable to ground water resources when the flow of the ground water is into lakes and marshes that support aquatic life. The Department further notes that biota living beneath land surface in swamps are supported by "ground water" as that term is defined by CERCLA.

Many comments suggested that §§ 11.62 (b)(1)(i) and (c)(1)(i) would apply drinking water standards to contamination levels directly in surface water or ground water. The comments stated that reliance on these standards disregarded whether surface or ground waters are actually used directly for drinking, ignores ordinary treatment before consumption, and thus permits speculative assessments for unfounded injuries.

The Department considers that use of drinking water standards to determine injury is appropriate. The comments' concern for the uses made of the ground water are more appropriately addressed in § 11.71, which provides for quantification of the reduction in services provided by the injured resource. The Department considers the requirements provided in § 11.32 for the development of the assessment plan sufficient to preclude speculative assessments. The Department notes that many of these comments may have misinterpreted the standard hydraulic definition of potable. Briefly, potable means that the water was "fit or suitable for drinking." Therefore, injury can occur only when applicable standards are exceeded in water that was fit or suitable for drinking.

Several comments objected to the injury definitions that allow concentrations in one resource (e.g., surface water) sufficient to cause injury to another resource (e.g., exceed air standards) to define injury to the first resource (surface water). These comments stated that such catch-all provisions are not required, that, although the air may exceed an air

standard, or contamination may have been present, this does not mean the surface water is independently or separately injured. Since standards for one medium are often set based upon effects through completely different exposure pathways than standards for another medium—for example, ingestion versus inhalation—the comments stated that injury in one medium does not necessarily translate to injury in another.

The Department disagrees with these comments. Where appropriate standards have been established, the Department has utilized those standards to determine injury. These standards are based primarily on the maintenance of the quality of specific services provided by the resource. However, in many instances, such standards have not been established. In order to capture the interdependence of resource services and the potential injury to the resource providing those services, the Department has established these provisions. The Department also disagrees with the statement that the presence of substances in resource "A" acting as a pathway to injure resource "B" should not constitute injury to resource "A". The "catch-all" provision was designed to capture those injuries that current standards have not yet been able to address. For example, a discharge or release into surface waters may not exceed established water quality criteria, yet the concentrations may be sufficient to bioconcentrate in migratory waterfowl that live and feed around the surface water. In that instance, the surface water containing the substance can also be determined to be injured.

Several comments stated that the water sampling procedures outlined by § 11.62(b)(2) are incomplete.

The Department disagrees. Section 11.62 defines the injury and sets acceptance criteria for determining injury. Guidance on methods for sampling and testing are provided in a separate section (§ 11.64) of the rule.

Several comments suggested that the number of samples with measurable concentration should not be limited to just two. One comment noted that the specificity in the rule is statistically inappropriate when nothing more is known about the nature of the area to be assessed.

The Department believes that two samples are appropriate acceptance criteria for injury determination, although more samples may be required to quantify the injury. Such injury acceptance criteria are cost-effective. A larger number of samples would not give



any better determination of *injury* and would cost more. The Department notes, however, that the total number of samples taken for the Quantification phase of the assessment is the decision of the authorized official. Consequently, the rule retains the requirement that two samples be used to measure concentrations of oil or a hazardous substance before the assessment of damages to surface water may continue.

Several comments stated that the requirement of 100 feet separation between samples to determine injury to water resources is inappropriate.

The Department agrees that in some situations, this separation may be inappropriate. Accordingly, § 11.62 (b) and (c) have been revised to incorporate instances when it may not be possible to separate samples by less than 100 feet.

One comment stated that injury to surface water resources and ground water resources (§ 11.62 (b) and (c)) should be defined to include any further degradation of water quality for those resources not used as a water supply. The Department believes the rule appropriately defines injury to water resources that are not used as a water supply.

One comment suggested that, for a potable ground water resource, there be a yield factor as well as a quality factor, and that low yield aquifers do not merit compensation. The Department notes that yield has little to do with the "quality" of the resource. In addition, adoption of this comment's suggestion would redefine the term "ground water" as defined in Section 101(12) of CERCLA and the definition of "ground water resources" in § 11.14(f) of the rule. Consequently, this suggestion is not incorporated into the final rule.

One comment stated that "duration," in § 11.62 (b) and (c) is not part of the SDWA standards. The Department notes that the rule calls for use of standards "established by . . . SDWA, or by other Federal or State laws or regulations that establish such standards." If duration is part of a standard in State regulation or law, then it should be applied whether or not SDWA contains such language.

Another comment noted that Resource Conservation and Recovery Act characteristics do not have "duration" as suggested in § 11.62(b)(1)(iv). The Act cited in § 11.62(b)(1)(iv) is the Solid Waste Disposal Act. The Department agrees that "duration" is not a characteristic of substances listed or identified pursuant to Section 3001 of that Act, and has revised § 11.62(b)(1)(iv) accordingly.

One comment stated that there is no justification for requiring "more than

one" of the purposes listed in § 11.62(b)(1)(iii) to be included. The Department notes that the definition in § 11.62(b)(1)(iii) does not require that "more than one" of the listed uses be made before injury is determined. The language in the proposed rule, which has been repeated in this final rule, states that if more than one use is made, "the most stringent criterion shall apply."

The Department notes that § 11.62(b)(1)(v) has been changed to include "Concentrations and durations of substances sufficient to have caused injury as defined in paragraphs (c), (d), (e), or (f) of this section to ground water, air, geologic, or biological resources . . ." The inclusion of ground water in this section is a correction of an unintended omission. The Department also notes that the phrase "was used" has been deleted from the definition of injury to surface water and ground water resources, where the phrase was used in reference to the committed use of these water resources (§§ 11.62 (b)(1)(ii) and (iii), and 11.62(c)(1)(ii) and (iii)). The Department considers the phrase redundant to the definition of committed use provided in § 11.14(h).

#### Section 11.62(d) Air resources.

Several comments were received on the use of air modeling techniques, which were described more fully in the supplementary technical information document on air models. One comment expressed the view that the document is valuable in identifying the thought processes that must go into developing a modeling approach, but that the modeler should be advised that a thorough understanding of the physical phenomena requiring the modeling is necessary, as well as a complete familiarity with the model to be used. Another comment stated that the technical information document lists only EPA's computer air models, leaving out other credible models that may be more accurate.

The Department, in response, points out that the technical information document is provided only for information purposes and is not binding for the assessment. Other models that meet the requirements given in the rule would be acceptable. In addition, the Department notes that no model or method is, in itself, adequate without trained specialists to understand its applicability, limitations, and results.

One comment recommended deleting the reference to section 112 of the Clean Air Act as defining an injury to air resources in § 11.62(d)(1) and, in its place, inserting reference to Section 109 of that Act.

The Department believes that the proposed language was consistent with Section 101(14) of CERCLA, which specifically defines hazardous substances to include those identified under Section 112 of the Clean Air Act. Therefore, this suggestion was not incorporated into this final rule.

#### Section 11.62(e) Geologic resources.

A few comments took issue with the determination of injury to soil microbial populations. The comments suggested that impeded soil microbial respiration and inhibited carbon mineralization, two of the definitions of soil injury in § 11.62(e), do not clearly indicate resource injury. Both responses occur in soil after oil or a hazardous substance is added, but most organic chemicals, including oil, cause the depressed rates to be followed by a surge of higher than normal rates before returning to the original rate. The comments stated that the surge is caused by the proliferation of the fraction of the biota that thrives on the new content of the soil; the return to original rates occurs when the organic chemicals have been consumed. They also stated that this change in the successful members of a soil community is less an injury than a part of the recovery process. In addition, the comments stated that the relationship of microbial respiration, carbon mineralization, and other tests of injury to soil or plant resources is not clear.

The Department agrees that oil or other organic material spilled on soils may cause a surge in microbial respiration and carbon mineralization, however, the rule states that injury occurs when "[microbial] growth [is] inhibited" by the oil or hazardous substance (emphasis added). The relation between microbial respiration, carbon mineralization, and the other tests of soil injury is that these tests are all measures of physical or chemical quality or viability of the resource.

One comment stated that the technical information document seemed to imply that models can be used to estimate transport parameters in soils; a misleading inference since models should use physical measurements of transport parameters to determine the fate of oil and hazardous substances in the soil. Another comment stated that a discussion of appropriate, available models of soil chemistry should be included.

The Department notes that the technical information document on soil provides general information and is not intended to have the force of regulation. The fact that the document "implies" models of contaminant transport in soils



may be used is reasonable, since the authorized officials acting as trustees have discretion to select models.

Several comments stated that the Department should re-examine the issue of pH range, contained in § 11.62, used for presumption of injury to geologic resources (soils). One comment stated that it is not the elevation of pH to above 8.5 (above 7.5 in humid areas) or the decline to below 4.0 that should serve as evidence of injury, but rather the concentrations of substances sufficient to cause change in the negative logarithm of hydrogen ion concentration of, for example, three units or more on the pH scale. Another comment stated that the rule should reflect the fact that many soils in the western part of the United States have a background pH of 8.3 or higher.

The Department disagrees that a change of pH in soils of two units would necessarily be an injury to the soil. However, the Department agrees that plants or other biota of the soil may be adversely affected by such a marked pH change. The Department believes that the definitions of injury to geologic resources contained in paragraphs (6), (7), (9), (10), (11), and (12) of § 11.62(e) adequately address the concerns of the comment. The Department agrees that the pH of some soils may naturally occur near 8.5. This factor will become important during the determination of baseline conditions and services quantification.

One comment suggested that in § 11.62(e)(3) the sodium adsorption ratio would be a better measurement to use than the exchangeable sodium percentage. The Department agrees with the comment and has made the change. The Department notes that the conversion of an exchangeable sodium percentage greater than 15 percent is equivalent to a sodium adsorption ratio of more than 0.176.

One comment stated that the use of erosion in § 11.62(e) as a criterion of injury to geologic resources was ill-defined and potentially difficult to accurately apply, since it would be very hard to link the occurrence of erosion to a particular discharge or release. The Department agrees with this comment and has dropped erosion as a direct criterion of injury to geologic resources. If erosion occurs when plant cover is decreased because of a discharge or release, the injury can be documented by reference to the paragraph in § 11.62(e) that covers phytotoxic response.

One comment stated that, by its very nature, mining is injurious to geologic resources, and that once ore is removed from the ground, the area may become

subject to "releases" into the ground water or subsurface system. The Department notes that such a release would result in liability only if it comes within the CERCLA definitions of "release" of a "hazardous substance," not otherwise exempted by the statute. The Department also points out that the rule reflects the statutory exception by prohibiting assessments when the discharge or release was specifically identified as "an irreversible and irretrievable commitment of natural resources . . . and the facility or project was otherwise operating within the terms of its permit or license" (§ 11.24(b)(1)(i)).

Several comments pointed out that the saturation value in § 11.62(e)(4) (now (3)) should be corrected to read "2 millimhos per centimeter," not "micromhos". The Department agrees and has made the correction.

#### Section 11.62(f) Biological resources.

Several comments requested that the Department add an additional injury definition to biological resources, in § 11.62(f)(1), to include specific tissue concentrations of substances that pose a threat to the health of biological resources. One comment noted that long-term exposure to oil in tissues could potentially lead to less obvious and less severe injuries than those identified in the rule. Another comment recommended eliminating all reference to tissue concentrations that exceed guidelines for human consumption, stating that such concentrations do not adversely affect the viability of the biological resources.

The Department recognizes that various criteria, standards, and guidelines have been developed for the presence of oil and hazardous substances in water and air. Guidelines have also been developed for biological tissues that are directed towards limiting human exposure to hazardous chemicals and use of biological resources. The Department was, however, unable to identify the existence of any chemical criteria, standards, or guidelines for tissue concentrations that specifically address protection of the biological resource from injury due to the presence of the oil or hazardous substance. All established criteria, standards, and guidelines are based on protection from exposure to oil and hazardous substance, not tissue concentrations of substances that pose a threat to the health of biological resources.

The Department recognizes that, in some instances, tissue concentrations of oil and hazardous substances can pose a threat to biological resources. The

Department's definition of injury to biological resources includes measurable adverse changes in the viability of the resource that can result from both long-term exposure and the accumulation of substances in body tissues. The Department has concluded that there is insufficient technical information currently available to stipulate specific tissue concentrations for the many oils and hazardous substances as a definition of injury to biological resource viability.

Variabilities in species sensitivity, age, sex, and the general condition of an organism all influence the potential long-term threat from such tissue concentrations. As noted in Section II of this preamble, many organisms can carry low levels of foreign chemicals in their tissues with no known measurable adverse effects from these chemicals. Although criteria, standards, or guidelines have not been established as yet, there is considerable technical data developed that may be applicable on a case-by-case basis. Where such data exists and no biological injury, as defined in this rule, can be identified, the authorized official is encouraged to work within existing or planned response actions to alleviate potential threats to biological resources.

Numerous comments were received on the acceptance criteria contained in § 11.62(f)(2) for determining injury to biological resources. Some comments supported the concept of the acceptance criteria for documenting injury to biological resources. The comments viewed the criteria as technically sound and agreed that all four criteria must be satisfied before an acceptable determination of injury can be made.

Several of the comments expressed the view that the criteria were extremely rigid in view of the paucity of information concerning the transport, fate, and effects of hazardous substances in the natural environment. One comment indicated that a liberal test for injury was necessary and that the criteria should not require absolute scientific certainty. Another comment suggested that the Department should allow experimental results to be judged by experts in the field to see if presented results were deserving of merit and consideration, and that research studies should also be allowed to prove injury. Yet another comment expressed the view that the criteria could make it difficult or impossible to document injury in some circumstances where it would be reasonable to assume injury had actually occurred as a result of a hazardous substance release. One comment questioned the need for



meeting both the field and laboratory criteria.

Opposing comments concerning the acceptance criteria stated that CERCLA does not allow for damage awards for remote or speculative injury. One comment urged that assessments be performed using criteria and methods that have been validated and, therefore, are of established and accepted scientific reliability. Another comment suggested that the criteria be more restrictive by requiring that the application of the acceptance criteria be chemical-specific for each oil and hazardous substance. The comment noted that a rebuttable presumption cannot be attached to methods of doubtful scientific validity. One comment felt that the criteria are difficult to apply and allow acceptance of injuries that appear theoretical in nature.

The principal means of identifying injury to biological resources, as stated in the rule, is by documenting a measurable biological response, i.e., there must be a measurable adverse change to the viability of the biological resource or its offspring as a result of the discharge or release. The acceptance criteria in the rule provide the means for evaluating the level of scientific understanding and, thus, the validity of documenting injury to biological resources based on a particular biological response measured in the assessment area. Since a rebuttable presumption is provided to assessments performed by Federal officials pursuant to this rule, the level of scientific understanding for determining injury is important.

The technical literature contains extensive documentation for a vast array of different types of biological responses that can be exhibited by organisms. Many of these biological responses have, to differing degrees, also been attributed to exposure to oil and hazardous substances. The level of scientific understanding can vary greatly, ranging from those that have been postulated by a single observer incidental to a study to those considered "classical" responses to oil or hazardous substances. In recognition of these different degrees of scientific understanding pertaining to biological responses, the Department continues to require that all of the acceptance criteria provided in § 11.62(f)(2) of this rule be met to document injury.

The Department acknowledges that the acceptance criteria are stringent. The Department does not, however, view the acceptance criteria as being either unduly rigid or requiring "absolute" scientific certainty as

suggested by one comment. The Department does not consider that biological responses for which a paucity of information exists in the technical literature constitute sufficient scientific understanding for documenting injury pursuant to this rule. The acceptance criteria do not require absolute scientific certainty since no biological response is caused exclusively by oil or hazardous substances. The criteria require the biological response to be predominantly caused by oil or hazardous substances.

The Department recognizes the technical merit of the peer review process for publication of research findings. This merit is reflected in the requirement that biological responses meet both field and laboratory criteria. General research studies are not compensable under a damage assessment performed pursuant to this rule, since it is inappropriate that experimental research studies to advance general scientific understanding be included as a part of a specific natural resource damage claim.

The Department believes that the requirement of meeting all four acceptance criteria does eliminate the potential for remote or speculative injuries as cited by some comments. The biological response must have been previously documented under both field and laboratory conditions, and the methodologies used to measure the biological response must produce reproducible and verifiable results.

The recommendation of one comment that the acceptance criteria be applied to biological responses on a chemical specific basis is considered by the Department to be unduly restrictive. There is considerable information available in the published literature that demonstrates that particular biological responses are not necessarily unique to specific chemicals. For example, the similarity in the molecular structure of certain classes of chemicals are known to elicit the same biological response.

One comment stated that other factors, such as nutrition and human disturbances, must be considered before a biological response can be attributed to injury presumed to be caused by an oil or hazardous substance. The Department recognizes that such other factors can also cause a particular biological response. The acceptance criteria considers such factors. Further, the design of the testing and sampling program for documenting injury must consider such factors when fulfilling the requirement, in § 11.62(f)(3), that a statistically significant difference be shown in the biological response observed between samples from

populations in the assessment area and those in the control area.

One comment requested that further definition of the term "statistically significant difference," as used in § 11.62(f)(3), be provided and the concepts (e.g., significance) and statistical methodology be included as part of the final rule. The Department considers that the guidance provided at § 11.31(c)(3), which requires a Quality Assurance Plan consistent with the requirements of § 300.68(k) of the NCP, provides adequate definition and guidance.

Several comments suggested that the Department include additional categories of injury in the rule. Floral abnormalities, such as chlorosis, abnormal growth, and reproduction, were cited as examples. Another comment requested that additional species to that of fish and wildlife be evaluated for types of biological injuries. One comment requested clarification that other biological responses beyond those listed in § 11.62(f)(4) could be applied to document injury to biological resources and that the authorized official is not restricted specifically to this list. In response to these comments, the Department reiterates that the acceptance criteria provided at § 11.62(f)(2) are intended to apply broadly to all biological resources, not to just the fish and wildlife species provided in § 11.62(f)(4). The authorized official may select other biological responses for other species to document injury so long as the response relied upon can meet the acceptance criteria. In response to these comments, § 11.62(f)(4) has also been revised to clarify that the authorized official may designate other responses when appropriate.

One comment correctly noted that discharges or releases can provide the opportunity for direct physical observation of dead or dying organisms. The rule allows for fish kill investigations, but no comparable investigations are provided for wildlife resources. In response to this comment, the final rule has been revised to provide for wildlife kill investigations in § 11.62(f)(4)(i)(C). There are presently no generally accepted procedures for conducting wildlife kill investigations. To the extent practicable, the authorized official should conduct such wildlife kill investigations in a manner comparable to the procedures provided for conducting fish kill investigations.

A comment stated that the absence of a species in an area containing a known concentration of an oil or hazardous substance did not appear to be



addressed by the rule. The Department points out, however, that the absence of a species may have occurred due to several reasons, that is, the organisms may be absent because they have either died or they are adversely avoiding the area containing the substance. The Department has identified, in the proposed rule, several such procedures that meet the acceptance criteria for documenting such injuries. These procedures have been retained in this final rule.

One comment requested that the rule state clearly that the procedures referenced in the American Fisheries Society Special Publication Number 13, "Monetary Values of Freshwater Fish and Fish-Kill Counting Guidelines," pertain only to the quantifying procedures for determining numbers of fish killed. The Department agrees with this comment and has changed § 11.62(f)(4)(i)(B) of the rule to reflect this concern.

One comment stated that the oil or hazardous substance used in laboratory toxicity testing, avoidance, and reduced fish reproduction should use the exact substance or a substance that is reasonably comparable to the substance discharged or released. The Department agrees with this comment and has modified § 11.62(f)(4) (i)(E), (iii)(B), and (v)(E) to reflect this comment.

Several comments recommended deleting laboratory toxicity testing, avoidance, and reduced fish reproduction from the rule stating that such biological responses are hypothetical bench tests that, unless there is intrinsic evidence that the release has actually caused the effect in the assessment area, should not be used as a basis for injury determination. The Department believes that the evidence in the scientific literature linking the toxicity of chemicals in the laboratory to toxic conditions in the field is substantial. In fact, all national water quality regulation strategies and standards are based on this well documented relationship. The Department's "Type B Technical Information Document: Injury to Fish and Wildlife Species" identifies a number of the technical publications and EPA technical support documents that substantiate the extensive level of scientific understanding linking the toxicity of chemicals in the laboratory to toxic conditions in the field. The Department further notes that the requirements provided in § 11.63 for the pathway of contamination provide guidance on the exposure.

One comment noted that fledgling success provided in § 11.62(f)(4)(v)(B) for measuring reduced avian

reproduction can be affected by other factors, such as noise or other human disturbances during remedial actions, rather than from a particular chemical substance. The Department recognizes that other factors can, at times, also affect avian reproduction. It is also recognized that such factors need to be considered in the study design for documenting such injury, including the selection of a comparable control site and the statistical design of the sampling program. Sufficient studies have been conducted, however, that enable reduced avian reproduction to have fulfilled all the acceptance criteria for documenting injury to avian species.

One comment noted with regard to § 11.62(f)(4)(iii)(A) that the presence of specific behavior in "two" organisms is not statistically significant. In addition, a variety of substances could elicit the same or similar clinical behavioral signs of toxicity. The Department agrees with the comment, and § 11.62(f)(4)(iii)(A) has been revised to state that a statistically significant difference must be measured.

One comment stated that "avoidance" alone, as proposed in § 11.62(f)(4)(iii)(B), did not constitute a biological response reflecting injury to the biological resource. The comment noted the fact that biota may avoid a specific environmental condition does not indicate that the organism has been or is likely to have been harmed. Avoidance may actually benefit the organism. The Department considers that avoidance behavior is an adverse response exhibited by the organism. Such avoidance of a geographical area may preclude the organism's use of the area as habitat, or preclude migratory or reproductive behavior. As such, this biological response has been retained in the final rule.

One comment stated that the limitation of one type of injury for cancer of neoplasm in fish is too rigid. Neoplasms in organisms other than fish, particularly terrestrial fauna, should be considered in determining injury by comparing frequency of occurrence between samples from populations in the assessment area and in the control area. This can be confirmed by histological procedures. The Department points out that, at this time, there have not been either field or laboratory studies conducted on terrestrial fauna to indicate that such injuries do occur because of exposure to oil or hazardous substances. There is, as yet, an insufficient level of scientific understanding of neoplasms in wildlife that would allow such biological responses to fulfill the acceptance criteria.

One comment noted that for injury determination to biological resources (§ 11.62(f)), the rule identifies the following seven categories of adverse change: death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, and physical deformation. No biological responses, however, are provided in § 11.62(f)(4) for genetic mutations in fish and wildlife. The Department notes that a review of the technical literature was unable to identify any biological response for genetic mutation injury that fulfilled the acceptance criteria.

#### *Section 11.63 Injury Determination phase—pathway determination.*

One comment stated that the discussion of pathway determination is needlessly unclear and confusing and should be clarified. Whereas the rule is explicit that a pathway must be demonstrated and documented using sampling and/or modeling, it also indicates that it is not necessary to show that the release caused the injury, only that the substance was released and that exposure could have resulted in injury. The comment stated that the rule should be modified for simplicity and clarity to state specifically that an injury cannot be determined unless a direct pathway from the discharge point to the injured resource can be demonstrated and documented quantitatively.

The Department notes that the rule does require that the pathway be demonstrated in order to establish injury. The rule requires that it be shown that the release "resulted in" the injury. Further, the Department believes that § 11.63 incorporates necessary guidance to enable the authorized official acting as trustee to link the pathway to the injury.

One comment stated that § 11.63(b)(2)(i) should be amended so that the reference to "downstream of the source" in the pathway determination phase would include "downstream or downcurrent of the source." The Department agrees, and has added the phrase "downcurrent of the source" in § 11.63(b)(2)(i).

One comment suggested deleting, in § 11.63(b)(3) (i) and (ii), the lists of data that should be determined, since these lists have little apparent relation to subsequent evaluations under § 11.63(b)(4). The Department believes that determining the hydraulic characteristics of the surface water resource (§ 11.63(b)(3)) is appropriate and directly related to determining the mobility or pathway of the oil or hazardous substance through the



resource (§ 11.63(b)(4)), and has retained this discussion.

One comment stated that in making "pathway determinations," current field measurement and modeling techniques will not prove adequate in certain situations. The Department disagrees with statements that current techniques are not adequate for certain "pathway determinations." The guidance in § 11.63(a)(2) allows for either demonstration of the presence of the oil or hazardous substance or use of appropriate models to determine pathway.

One comment suggested that modeling results must be required to demonstrate the direct measurement of "sufficient concentrations of hazardous substances," and that the pathway determination process should be linked to the injury determination step. The Department agrees that "sufficient concentrations" are part of the definitions of water resources injury, but these are directly measured in the injured resource. The pathway determination (in § 11.63) establishes a link between the discharge or release and the injury.

Another comment felt that direct measurements are more reliable than models and therefore should be favored in making the pathway determination. The Department favors direct measurement over the use of models and notes that the rule requires detailed technical explanation of physical-chemical models used by the authorized official (see § 11.64 (b)(6) and (c)(8)). In general, the Department believes guidance provided in this rule is sufficient to enable the authorized official to choose the appropriate method for determining pathways.

One comment suggested that in section 11.63(f)(4)(ii)(A)(5), the word "cannot" appears to be an error. It should be stated as "can be detected . . . ." This comment is mistaken. The paragraph is correct as stated in the rule. The Department stresses that a species should *not* be used as an indicator species for demonstrating a pathway of contamination if that species readily metabolizes the substance in question.

One comment stated that the rule should allow for the use of wild-strain organisms that have been reared in a laboratory setting as indicator species in § 11.63(f)(4)(ii)(C). The Department accepts this comment and has so amended the rule.

#### *Section 11.64 Testing and sampling methods.*

One comment suggested that under § 11.64(b)(2), acceptable sampling

methods should include "User's Guide to the U.S. EPA Contract Laboratory Program" prepared by the EPA Sample Management Office of the Contract Laboratory Program, August 1982. The Department agrees that the document cited may provide useful technical information on sampling methods, but has moved this reference to Section II of the preamble.

Several comments noted, under § 11.64(c)(3), that it is considered appropriate practice with many contaminants (e.g., metals) to filter samples of ground water. Unfiltered samples are likely to contain materials introduced by well construction, whereas filtered samples are often more typical of the actual ground water. The Department agrees that both filtered and unfiltered water samples may be collected, as appropriate, and does not now specify which one shall be used.

One comment stated that § 11.64 limits trustees to six standard procedures for chemical analysis of fresh- and salt-water surface water resources. The comment recognized the advantages of establishing standard procedures in case of future litigation, but expressed concern that the specified procedures may not be appropriate in all circumstances. Several comments suggested that trustees should be given the opportunity to use other scientifically valid procedures for chemical analysis in the event that the specified procedures are not appropriate.

The Department agrees that specific procedure manuals should not be incorporated by reference, rather they should be listed as references, to be used by the authorized official, as appropriate. The standard procedures listed in § 11.64 of the proposed rule now appear as information manuals in Section II of this preamble.

One comment stated that the references listed in the proposed rule for environmental testing methodologies are not complete, yet the language on the damage assessment procedures allows only the listed methodologies to be used (see § 11.64(b)). This could preclude use of other methodologies that may be appropriate for determining the extent of injury to the natural resource. The comment stated that it also could complicate efforts to avoid duplication in tests conducted by the authorized official and the lead agency.

The Department has reworded § 11.64 to allow the authorized official to use discretion in selecting appropriate methods, including methods suggested in documents listed in the preamble.

One comment recommended that a new subsection be added to § 11.64 to

read as follows: "All samples shall be gathered at locations and times found by the authorized official to be likely to show positive results. All samples shall be representative, and the data on the samples shall be publicly available upon request."

The Department agrees that all samples should be representative of the resource condition, and that the data obtained from samples should be available to the public at times and in a format provided for in the Assessment Plan. However, the Department disagrees that the samples should be chosen to increase the probability of positive results.

Several comments suggested that scientific testing methodologies used by a trustee must be validated to ensure that the results of the use of such methodologies are reproducible.

The Department agrees that methods of laboratory or field analysis should be validated, reproducible, and subjected to appropriate scientific scrutiny. The Department believes the references listed in Section II of the preamble to this rule provide appropriate guidance to the authorized official when developing an Assessment Plan.

#### *Section 11.70 Quantification phase—general.*

A number of comments reacted to the variety of different ways to carry out quantification with a concern that it could turn out to be an excessively expensive and time-consuming process, and suggested that some flexibility be reduced.

The Department believes that the variety of situations anticipated will require considerable flexibility, as allowed by the rule. The different parts of the quantification phase contain many options that are to be selected only as appropriate to the situation. No assessment would be expected to or even be capable of using everything in this section, and, as with other phases of the damage assessment, compliance with the reasonable cost definition is required, and double counting is prohibited. As recognized by some comments, the Department agrees that successful planning and execution of the Quantification phase will require a high level of cooperation between economists and natural resource specialists.

#### *Section 11.71 Quantification Phase—service reduction quantification.*

One comment requested that the steps set out in § 11.71(b) include a preliminary estimate of services affected, before the baseline step, in



order to focus baseline studies on services. The Department points out, however, that such an estimate has already been made as part of the preassessment screen (§ 11.25(e)(2)). At numerous points, authorized officials are already directed to focus only on resources that have been injured and for which damage claims will likely be made (i.e., those for which services have been affected by the discharge or release, e.g., §§ 11.70(a), 11.71(a), 11.72(a), 11.72(b)(4)). The Department considers additional guidance on this point to be unnecessary.

Many comments recognized and supported the Department's emphasis on services as the focus of quantification. Some asked that this emphasis be made even stronger, and even recommended that quantification be strictly limited to determination of services reduced, suggesting that measurements of "conditions" other than services are irrelevant and unnecessary. A number of other comments also requested that extensive additional guidance be provided on the nature of services to be measured, and on methodologies for doing so. A few suggested that the discussion of services provided in § 11.71 conflicted with the definition of services provided in § 11.14(nn), or provided an alternative definition. Some also suggested that the term "committed use" be incorporated in this section.

The Department acknowledges the support for its emphasis on services. It continues, however, to believe that in most cases it will be necessary for "conditions" to form the basis for service reduction measurements. Ultimately, the level of change in human uses will be dependent on the physical, chemical, or biological changes resulting from the discharge or release, as will any determination of recovery rates, so retention of the discussions of methods for measuring "conditions" is considered essential. In some cases, it may be possible to measure services directly, and provision has been made for such measurement (§ 11.71(f)), but the Department does not believe total reliance can always be placed on direct measurement.

The Department has not modified its treatment of services from the proposed rule. The discussion of services contained in § 11.71 does not redefine the term, but rather provides further clarification of the term. The definitions in § 11.14 are brief, and cannot describe every aspect of each term as provided in the rule itself; otherwise the definition section would become unwieldy and no longer useful. Also, the Department has already provided examples of services,

and does not consider it practical or advisable to attempt an exhaustive list of services. A major responsibility of agencies acting as trustees, independent of the damage assessment process, is to manage the natural resources for which they act as trustee, and in the process they must be conversant with the services provided by those resources. In many cases, these responsibilities for services are included in the basic statutes establishing the agency, often among its stated purposes. Because continued provision of those services is so basic and important for such agencies, detailed listing of them here is unnecessary. The Department also believes that an overly detailed list here could be misconstrued as constraining agencies acting as trustees from pursuing claims based on services for which they have a major responsibility, but which the Department may have failed to list.

The Department also has not provided additional guidance on methods for measurement of services. Proper measurement of services is inextricably linked with the economic methodology selected in the Damage Determination phase, and the Department reiterates here that natural resource specialists must work closely with economists to carry out a reliable damage assessment. Much of the guidance in the Damage Determination phase applies to service measurement, and is not duplicated in the Quantification phase section. The Department also has not inserted the term "committed use" throughout the Quantification phase for the same reason: authorized officials are directed to quantify only resources and services for which they will claim damages, and damages can only be claimed for natural resources with "committed use" as defined in this rule. Because the Damage Determination and Quantification phases are not independent, use of the term throughout the Quantification phase would add little, and would reduce readability. Minor changes have been made to § 11.70 to clarify the general purposes of the Quantification phase, and make it more consistent with other parts of the rule.

Two comments objected to allowing direct quantification of services, on grounds that to do so would rely on speculative methodologies. On the other hand, numerous comments raised concerns that to require measurement of physical and biological changes in addition to measuring services could contribute to excessively expensive assessments, and many suggested that only human services be measured directly.

The Department agrees that direct quantification of services requires that precautions be followed to ensure the accuracy of any such assessment. It also believes that flexibility is needed and that both methods must be preserved as written for several reasons. The valuation methodology selected will generally require different kinds of data from the quantification phase. If lost use value will be the primary valuation method, then measurement of changes in human uses will be the critical factor. In some cases, it may be practical and possible to measure these changes directly, as allowed by § 11.71(f). To disallow such direct measurement would reduce the flexibility to use some reasonable-cost methods where those methods can meet the restrictions imposed by that section. If restoration is to be the primary valuation method, then measurement of biological, physical, and chemical parameter changes may be more critical, since these will be essential to designing an effective restoration and determining its success.

Several comments pointed out that the statutory exclusions in the proposed rule did not include the provision for "no recovery . . . where such damages and the release of a hazardous substance . . . occurred wholly before the enactment of this Act." Other comments interpreted this provision to require "partitioning," such that if a release and the resulting damages began before the Act, and continued past the date of its enactment, the authorized official would be required to determine which damages occurred in each period, and to make a claim only for those occurring after the date of enactment.

The Department has now added this exclusion to the list of statutory exclusions in § 11.71(g) to further clarify that it applies as cited. The application of this exception to a specific incident would depend on the the governing CERCLA case law.

One comment suggested that the word "proper" be inserted before "application of a pesticide . . ." in that exclusion. The Department, however, has used the exact language of the statute in this exclusion.

Two comments referred to the exclusion for permitted releases, and argued that it should extend to hazardous substances released incidental to permitted substances, even though those substances might not be specifically identified or included on the permit. One comment also argued that "partitioning" of liability should be done, so that liability would only extend to damages due to quantities of released



substances above permitted quantities. Finally, one comment suggested that the Department extend the exclusion to State-permitted releases.

The Department disagrees with these comments. The exclusion, as taken from the statute, clearly states that to gain the exclusion, the "facility [must be] otherwise operating within the terms of its permit or license." This exclusion applies only to Federally permitted releases; if a release is not specifically Federally permitted, it is not excluded from liability.

One comment stated that if resource conditions (e.g., contamination) have or are predicted to increase contaminant concentrations at the point of use, then these concentrations must be compared against applicable drinking water standards to determine whether they diminish the service flow. If they do not exceed Federal or State drinking water standards (e.g., MCL's under 40 CFR 141.11-16) at the point of use, and if they otherwise present no significant drinking risks, then again there has been no service flow reduction. The Department disagrees that the *only* appropriate measure of reduction in service is made at the point of use. The purpose of measuring reduction in service is to estimate damages so that the injured party may be made whole. Any treatment required after a release to make drinking water safe "at the point of use" is only one potential service of the water that can be quantified.

One comment noted that § 11.71(i)(4)(i) discusses quantifying the volume of ground water pumped from wells as if it can be priced by volume quantity. In fact, pumped ground water can be sensibly discussed as volume per a specified time period, and value can only be determined under methods that account for time as a variable (e.g., by fixing a particular duration for evaluation). The Department believes that the guidance in § 11.71(i)(4)(i) on quantifying services is appropriate; the authorized official must decide how to quantify the services lost or reduced.

One comment suggested that § 11.71(i)(2)(ii) is misleading in implying that it is simple to differentiate a "plume from background," and states that in fact it can be prohibitively difficult. The Department disagrees that § 11.71(i)(2)(ii) implies it is *simple* to differentiate a plume from background. In order to assess damages, the authorized official must determine the extent and nature of the services provided by the injured resource; assessment also requires determining where and how much the resource is injured. This task may be difficult, but

the rule both urges participation by potentially responsible parties and cautions the authorized official that the cost of research activities cannot be part of the damage claim.

One comment suggested that the "values" contained in Part I of "Monetary Values of Fresh-Water Fish and Fish Counting Guidelines" referenced in § 11.71(1)(5)(iii)(A), were out of date and incomplete.

The Department did not intend to endorse the use of Part I of this document in the proposed rule. To clarify this point, the words "for estimating numbers of fish killed" have been added after "guidelines" in § 11.71(1)(5)(iii)(A).

A number of comments recognized that although improvements could be made in the Habitat Evaluation Procedures (HEP) as a method for evaluating changes in habitat quality, there are no better substitutes available for certain purposes, and that at present it represents the "best available procedure" for those purposes. These comments represent fairly the Department's reasoning in including it among the allowed methodologies, as explained in more detail below.

Many comments raised concerns regarding use of HEP, as suggested in § 11.71(1)(8). These concerns included questions about the replicability of results derived from HEP, the need for modification of models derived originally for other purposes, and the degree of inappropriate discretion that might be exercised by persons carrying out a HEP analysis. In addition, one comment cited a study that suggested "proved" that HEP produced invalid results. Still other comments were concerned that HEP either did not reflect all services potentially reduced or lost due to a release or a discharge, that other methods might be more appropriate in a given situation, or that it might result in double counting when used in combination with other methods.

The Department believes most of the above concerns can be explained by providing further discussion of the HEP process and its anticipated role in damage assessment. The Department previously stated, both in the preamble and in the supplementary information document, that the HEP material produced for CERCLA damage assessments is intended as a supplement to the basic materials and training provided by the Fish and Wildlife Service for HEP; they do not and cannot stand alone. Certification of persons to carry out HEP involves a week-long training course, and the basic training and reference documents for HEP encompass several hundred pages.

Although the Department can summarize some of this material, the basic training course and other materials can provide a far better understanding of the process. (One comment questioned whether sufficient numbers of people had been trained in HEP. The Department had included in the technical information document data indicating that about 1,400 people have been trained nationwide, of which 70 percent represent private and government organizations other than the U.S. Fish and Wildlife Service. Courses are given frequently throughout the country.)

HEP is normally carried out by a team consisting of qualified persons who have taken at least the basic training course and who have training and experience with ecological measurement in general. The team generally will include at least three persons, and normal practice, as described in the HEP materials, is to include on that team qualified representatives of the principal parties involved in the action leading to the evaluation. For example, in planning mitigation for a highway project, the HEP team often includes biologists from the highway department, the State wildlife management agency, and the U.S. Fish and Wildlife Service. In some cases, where a project affects private interests (e.g., a permit required from the U.S. Army Corps of Engineers for dredging or filling for a private project) or where a conservation group may have standing and a strong interest in a project (e.g., one affecting a park or recreation area), qualified biologists representing such groups have also been included on the HEP team. The Department would expect a similar arrangement to be followed when performing natural resource damage assessments: a team might include qualified representatives from a Federal and/or a State agency, from one or more potentially responsible parties, and possibly one representing other interests, if appropriate, and as determined by the authorized official.

HEP teams composed in this way provide a means for different viewpoints to be heard and represented, yet each representative must be qualified both by background and by training in the HEP process. Decisions made as the HEP is carried out are generally by consensus within the team, thus providing for an internal conflict-resolution mechanism. Records are maintained of decisions and the reasons for these decisions, should any question arise later. As in any other part of a damage assessment, no matter who is actually carrying out the assessment, the agency acting as trustee



is ultimately responsible for the results and for ensuring that procedures are carried out properly.

A normal component at the beginning of any HEP is the choice of species for analysis, and modification of models as needed to fit the local situation. Such a process is hardly different from any other ecological analysis method where species must be selected, and generally standard census or population estimating techniques other than HEP also usually need modifications for local situations. For example, a "standard" (not HEP) "mark-and-recapture" technique for estimating populations of animals can require considerable modification for different species as to methods for capture, frequency of capture attempts, and duration of study needed to obtain valid results. These will all vary according to local conditions for most population estimating techniques, and HEP will require that the "standard" Habitat Suitability Index (HSI) models be modified to some degree in most cases. Also, as detailed in the basic manuals and training for HEP, many species models exist besides the HSI models developed by the U.S. Fish and Wildlife Service and others, and frequently these models can and should be used for HEP, with some modification. Further modification for use in damage assessments requires skills additional to those usually necessary for HEP analysis, and this and other problems that need to be met are carefully laid out in the technical information document.

HEP measures habitat quality of a study site or area by use of an index to the carrying capacity of that area for each of one or more evaluation species. These evaluation species are selected by the HEP study team according to criteria that include importance of those species both to man and to the ecosystem, and the degree to which those species can represent other important species in that ecosystem or habitat. Basic to this selection is the ecological concept of "guilds," where groups of ecologically similar species, such as seed-eating birds, hole-nesting insectivorous birds, or terrestrial grazing mammals, might be evaluated based on a typical or "representative" member of that guild. The criteria for selection of evaluation species are also embodied in the selection criteria of § 11.71(1)(2), which also adds other criteria specific to a damage assessment. Although some comments were critical of potentially poor choice of evaluation species, this problem is not unique to HEP; it would apply to any technique for ecological evaluation, and merely points up the

need for careful work by qualified professionals, as in all other parts of the assessment process.

HEP is one of a number of methods that may be used in quantifying changes in biological resources. Other methods include population estimation, index methods, and many others identified in § 11.71(1). An authorized official acting as trustee is given discretion in the rule to select from these methods when deciding how to proceed in a damage assessment; HEP may or may not be considered appropriate to a particular situation. One factor that may weigh heavily in that decision is the type of economic analysis that will be done. If restoration costs will be the primary method for measuring damages, then HEP might be especially useful, if other circumstances would allow its use. Use values as the primary measure of damages might be better determined through other methods, such as population measures or direct measures of lost services. HEP is a method for quantifying biological resources only; measures of other services of an area, such as provision of water for purposes other than habitat (e.g., recreation, drinking) would have to be done by other means. A careful reading of the rule will show that HEP was not proposed to measure anything beyond habitat values. Although care must be taken to avoid double counting, all services measured appropriately can be used in the quantification process.

Questions of replicability also are not necessarily unique to HEP. Ecological systems are extremely complex and by their nature are in a constant state of change, including a wide variety of interactions among different species and between species and the physical and chemical environment. Considerable improvement has been made in recent years in our understanding of these systems and of methods for measuring interactions but the inherent dynamic and probabilistic nature of ecological interactions will never eliminate uncertainty from our measurements, only allow improvements in our understanding of the degree of that uncertainty. (The physical sciences also have such limits; quantum physics, which deals with the most basic particles of matter, can only give probabilities, not "certainties.")

One comment cited a study by Bart, Petit, and Linscombe that was intended to test the validity of two muskrat (*Ondatra zibethicus*) HSI models, and suggested that it proved that HEP was an invalid method.

The Department has reviewed that study. This study compared calculated

HSI values with densities estimated by other methods. However, HSI values are an index of habitat quality as *potential* carrying capacity, not of density, and that difference is clearly spelled out in all materials pertaining to HEP. Many factors beyond carrying capacity can affect the actual density present on a given site. If it is important to an authorized official to measure densities or actual animal numbers (e.g., as a step in measuring services dependent on such numbers), the rule provides for such measurements by other means; HEP is not nor has it been represented as an appropriate measure of actual numbers or densities, although it may be an appropriate method in some cases where restoration of wildlife habitat is to be a primary component in the measure of damages.

That same comment also suggested alternative language for measurement of habitat quality, to replace § 11.71(1)(8), and would have omitted direct reference to HEP. However, that language did not provide more guidance as to what methods would be suitable compared to the present language, would not preclude use of HEP as apparently intended, and does not provide any alternative methods, so it was not adopted by the Department.

To provide for some additional latitude in choice of habitat quality measurement techniques, and to make this paragraph more parallel to the preceding two paragraphs, the Department is changing the word "should" to "may," but is retaining the reference to HEP. It should be noted that the rule refers to "techniques such as [HEP]," thus allowing use of similar methodologies, which are available and can be adapted in ways similar to the adaptations suggested for HEP. One such review of other methods for habitat evaluation is by T.H. Roberts and L.J. O'Neill ("Habitat Evaluation Methods—Examples and Guidelines for Selection," pp. 226-269, in Bell, J.F. and T. Atterbury, eds., 1983, *Renewable Resource Inventories for Monitoring Changes and Trends*, Proceedings of a Conference in Corvallis, Oregon, August, OSU College of Forestry, Corvallis.). The Department notes that paragraphs (1) through (4) of § 11.71(1) provide more extensive guidance on general criteria for selection of biological quantification methods, including those for habitat measurement. Paragraphs (5) through (8) of § 11.71(1) are essentially supplementary to that guidance for certain specific types of methods.

A number of additional comments directly addressed the technical information document for HEP or



involved details of the implementation of HEP. The Department is addressing these in the revision of the technical information document. The Department notes that the technical information document on HEP provides general information and is not intended to have the force of regulation.

*Section 11.72 Quantification phase—baseline services determination.*

A number of comments were supportive of the Department's concept of baseline as a way to distinguish between effects resulting from actions of the responsible party and effects resulting from other causes; these comments encouraged retention of this basic concept. The Department acknowledges these comments and is retaining the baseline concept in the final rule.

Several concerns were raised in comments discussing the question of determining and using the "baseline." Some comments suggested that the concept might be unworkable for the mining industry, primarily because of naturally existing contaminants or because of long-term and widespread effects of mining that might in some instances have begun more than a hundred years ago.

The Department believes many of these concerns stem from apparent misunderstandings of the proposed rule. Baseline is not intended to represent necessarily pristine conditions, nor is it intended to represent conditions in the absence of "any" discharge or release. Rather, the rule specifically requires that baseline represent conditions that would have existed in the absence of the specific discharge or release under investigation. Thus, effects of other discharges or releases, as well as any other natural or human-caused effects, are to be accounted for in determining the baseline against which the effects of the discharge or release under investigation are measured. The intent is to restrict liability to those effects resulting from the responsible party's actions, as in any other liability situation. Thus, in a mining district where there may be a "background" level of a particular hazardous substance in all water collected, if it is clear that the release under investigation is not responsible for that background level, that background level would likely be an appropriate baseline level. Further, experience of the Department with restoration of mining sites does not confirm the suggestion that adequate baselines cannot be established for mining sites. Federal and State permits for mining frequently contain provisions requiring restoration to pre-mining conditions, and a process very similar to

the determination of baseline here is commonly carried out to do so.

Several comments suggested that using baseline as defined was too stringent, or that it would require excessive work to determine, possibly requiring several years of work. Among the suggestions was the use of "standards" as a baseline, even if baseline as defined in the rule might have involved lower concentrations of a contaminant than a standard. Arguments for such use included claims that a standard used for baseline would allow restoration of all services, and that going beyond standards to establish baseline often was technically not feasible.

The Department disagrees. Standards are used in determining the threshold of whether or not an injury occurred for many natural resources, but that is a different phase of a damage assessment, although some commenters apparently were confused to some degree about the difference. In the Injury Determination phase, a threshold test is made to determine whether or not an injury occurred; no determination is made at that stage of how extensive the injury is. No previously existing standards are available for many resources, especially for biological resources, so reliance on standards for determining baseline would leave a great many injuries uncompensated. Also, the suggestion that restoration to a standard would compensate all lost services is unsupported by evidence. The Quantification phase is where the extent of service change is determined, which is basic to determining the level of compensation to be required. In common law, the principle is to make the injured party "whole" again. Measurement merely to a standard would, in some cases, not make the party whole again, and in other cases would over-compensate for the actual loss. Where a resource previously had no concentration of an oil or hazardous substance, or a concentration considerably lower than an established standard, restoration only to "standard" would leave uncompensated the service provided by that resource of being able to absorb low levels of that material without exceeding standards or without other effects. That capability is extremely important, because otherwise liability could fall to any party that later released even a small quantity of a substance, which would then raise concentrations above the injury threshold again. Thus, the Department does not accept the suggestions to change the definition of baseline.

On the other hand, the Department recognizes that technical feasibility and

considerations of reasonable cost may dictate use of a baseline that does not fully represent the baseline as defined. A new paragraph, § 11.72(b)(5), has been added to give the authorized official more flexibility in this regard, subject to certain restrictions to ensure that the necessity for this modification has been established, and that the baseline used is conservative and does not lead to assessments greater than what would have been found if the change were not made. As in all other phases of the assessment process, this is a decision ultimately of the authorized official.

A small number of comments suggested that the provision in § 11.72(c) for adjusting historical baseline data "[i]f a significant length of time has elapsed since the discharge or release first occurred, . . ." be eliminated as a condition for such an adjustment. The primary argument for such a change was that any changes due to causes other than the discharge or release under investigation should be accounted for in the baseline determination.

The Department agrees with and has repeatedly emphasized the point that liability should be limited to changes resulting from the discharge or release under investigation. Generally, the guidelines and methodologies provided for the Quantification phase focus on the extent of the injury caused by that discharge or release. Adjustment of the baseline to achieve this purpose is already provided for in the general requirements for quantification and in the general guidelines for establishing baseline, especially § 11.72(b)(1). The intent of the sentence in § 11.72(c) was to allow adjustment of historical data for changes that occurred over time, such as land use changes and biological succession, that may be especially important when analyzing historical data. It does not eliminate the requirement to measure the extent of injury due to the discharge or release, which may involve other questions such as alternative sources of contaminants. The words "significant length of time" should also be understood as being relative to the resource and normal rates of change in that resource. For some resources, a few months or years may be significant. No change was considered necessary or has been made in the proposed language.

Some comments expressed concern over the difficulty of finding historical data that could meet necessary standards for an assessment. One problem cited was the recent development of highly sensitive detection methods for contaminants that were unavailable previously.



The Department agrees that historical data may not be readily available in all cases, but leaves the option for cases where it may be available. Also, in this context, "historical" is used in a broad sense, and may represent recently collected data, even up to the point immediately preceding a discharge or release. The lack of sensitive detection methods historically is not as critical as characterized by some comments; useful data may include population data, specimens collected at some point in the past, or other types of data that do not rely on availability of those methods.

One comment stated that the requirement of one full cycle in the Quantification phase, baseline services determination, should be flexible since one full cycle can extend over many years. It was recommended that specific cycle requirements be established for each general type of resource. The Department notes that this restriction applies to control areas *if needed* and is modified by the general guidance given § 11.72(b) (2), (4) and the new (5).

One comment stated that § 11.72 does not contain adequate or appropriate guidance for the selection of a control area. The comment argued that a control area should be selected that closely approximates the background contaminant level conditions at the CERCLA site in question. The Department believes the guidance provided in the preamble and in § 11.72 is adequate to enable the authorized official to select appropriate control areas. The comment has misread the guidance given in § 11.72(d)(1); the guidance there specifies lack of exposure "to the discharge or release of" (emphasis added). What is indicated is that the discharge or release that led to the assessment should not affect the control area.

One comment stated that, while the use of control areas to establish baselines may be adequate to a degree for air and geologic resources, the comparability of control areas to assessment areas for surface and ground water, and particularly, biological resources will be extremely difficult to demonstrate beyond reasonable doubt. According to this comment, the variabilities in the components of these resources even within the same systems are subject to the constant variations and interactions of numerous ecosystem elements, and experts invariably will be divided on the adequacy of baseline characterizations determined via control areas over pre-discharge data from the same systems.

The Department disagrees that comparability of control areas to assessment areas will be extremely

difficult to determine; but agrees that establishing comparability will take effort. Although experts may disagree, the Department believes that the authorized official must make his determination and proceed with the assessment, so that a claim is made in a reasonable time period.

One comment stated that it agreed with the proposed rule that the restoration or replacement should be to pre-release, or without-a-discharge or release, condition where the natural resources are not already depressed or diminished below those levels found in equivalent control areas. However, the comment stated that the definition of the "baseline" condition (§ 11.14(e)) and the injury quantification as a departure from baseline presented in the proposed rule could present problems in the case of repeated discharges or releases. The comment stated that the proposed rule should be amended to account for those instances of repeated discharge or release so that, after a second release, the assessment does not yield the determination that no injury occurred because of a depression of the "baseline" condition due to a previous discharge or release.

The Department agrees that repeated discharges or releases may affect the baseline determination; however, the Department believes that consideration of repeated releases will depend upon application of the liability provisions of CERCLA to the facts of the situation under investigation. All releases that meet the statutory elements may be considered. The authorized official would determine the baseline or "without-a-release" condition on the discharges or releases that come within the statute.

One comment suggested that the rule needlessly requires thorough characterization of a control area. The comment suggested that the rigorous examination of control areas should be an unusual measure—required only when unusual baseline conditions, i.e., not free of contamination, are expected to prevail. The Department agrees that establishment of baseline should not employ control areas unless necessary. Section 11.72(b) requires that all actions are to be reasonable and appropriate.

One comment stated that the guidance in section 11.72(g)(3)(i) for surface water control areas, which is keyed to finding areas "not . . . exposed to . . . release of a hazardous substance," is too broad. The comment stated that a control area should be comparable to the study area except for the specific releases at issue; it should therefore contain whatever other hazardous substances were not part of that release. The language

defining control areas for ground water resources, § 11.72(h)(3)) should serve as the model for modifying this section. The Department believes that this comment misquotes the guidance given in § 11.72(g)(3)(i) that "The water and sediments . . . have not [been] exposed to the discharge or release" (emphasis added). The Department notes that the rule refers to the oil or hazardous substances whose discharge or release led to the assessment.

One comment noted that § 11.72(h)(4) indicates that ground water wells should be sufficient to estimate the concentration of substances in the unsaturated zone. The comment points out that, by definition, ground water wells sample *only* the saturated zone. Field devices to collect water from the unsaturated zone are notoriously difficult to install and use. Characterization of the unsaturated zone should be limited in the rule to information collected by analyzing soil collected from soil borings or during well installation. The Department notes that the guidance in § 11.72(h)(4) pertains to *estimating* vertical and lateral variations in concentrations; further guidance on sampling earth materials is given in § 11.72(h)(4)(ii).

One comment suggested that under § 11.72(g)(4)(iii)(A), "the range of concentration" should be changed to "the approximate range of concentration." The Department agrees and has made this change.

One comment stated that the methods set forth in SW 846 are not reliable or useful unless or until they are validated. Further, the comment requested that the Department grant a ruling of equivalency to the comment alternative for the analysis of Appendix VIII compounds in ground water. The alternative involves the use of Clean Water Act Section 304(h) Gas Chromatography/Mass Spectroscopy ("GC/MS") methods with more extensive library searching and the use of conventional methods for detection of metals, cyanides, and sulfides. The comment recommends that the Department consider the inconsistencies of the SW 846 methods before including them in this rule. The Department agrees that the GC/MS methods are reliable and may be useful; however, it should be noted that information references here have been moved to Section II of this preamble and are not incorporated by reference in this final rule.

#### Section 11.73 Quantification phase—resource recoverability analysis.

Several comments were critical of allowing authorized officials to use



recovery times shorter than the total time necessary for restoration of services.

One comment stated that the rule, in §§ 11.14(gg), 11.73(a), and 11.84(g), allows the authorized official to select a recovery period shorter than the natural recovery period, and that the use of a shorter recovery period necessarily results in a damage award that does not fully compensate the trustee for the injured resources. The comment recommended that the authorized official should not be allowed to use a shorter period unless the costs of using the full recovery period are grossly disproportionate to the benefit gained.

The Department believes that the reasonable cost and cost-effectiveness criteria in CERCLA require that the authorized official have an option to use a shorter period. This allows the authorized official to avoid the expense of quantifying effects so far out into the future that the economic value would be negligible.

One comment requested further guidance on distinguishing "complete" recovery from "functional" recovery, to avoid use of excessively long recovery times by the authorized official. The Department previously included in this section the concept of recovery to the point where services are restored to baseline levels. No further guidance on this point is considered necessary.

One comment suggested that "natural recovery" might predominate when cost-effectiveness is considered, and asked what recourse the government or public had in cases of inaccurate recovery time estimates.

The Department points out that the statute requires consideration of natural recovery periods. In order to determine the most cost-effective restoration alternative, the authorized official acting as trustee must also consider effects on services, lost use values, and other economic considerations of the Damage Determination phase. In considering these factors, it is possible that natural recovery may be the cost-effective alternative. The authorized official is an official of the Federal or State agency acting as trustee, and all phases of the damage assessment, including the recovery time estimates, are the responsibility of that official, even if the assessment is carried out by a potentially responsible party. Only the authorized official actually makes determinations, no matter who may be doing the work.

One comment recommended adding "deputation" rates to the processes to be considered in § 11.73(c)(2)(iv)(C). The Department agrees with that suggestion, and has added the term.

#### *Section 11.80 Damage Determination phase—general.*

One comment suggested that the rule correctly defined an equivalent or replacement resource as one that produces the same service, but that the same equivalence should not be extended without qualification to resources producing "similar, or related" services. The comment suggested that, to be equivalent, it is necessary that the substitute resource provide equivalent kinds and amounts of "social utility," not merely support "similar" or "related" services.

The Department agrees that, theoretically, a qualifier such as "social utility" could be added to this definition. However, as well demonstrated in the economics literature, the operational rules for implementing such a qualifier are fraught with theoretical (e.g., Arrow's "Impossibility" Theorem), empirical (e.g., estimating "direct" or "indirect" utility functions, if individual utility functions are to be arguments in any "social utility or welfare function"), and practical difficulties (e.g., if there is such a thing as a "social utility or welfare function," are individual utility functions given equal or some other scheme of weights?). These are but a few of the many problems entailed in following this suggestion. These problems are complex and are not yet resolved to the universal satisfaction of the economics profession. To attempt to resolve them in this rule would be an impossible task. Because of these problems, this comment has not been incorporated into the final rule.

#### *Section 11.81 Damage Determination phase—restoration methodology.*

Some comments were concerned about the possibility of "double counting" because § 11.81(b) allows for damages based on restoration or replacement costs to include "any diminution of use values, as described in § 11.84, of this part, occurring during the recovery period as determined in § 11.73 of this part." The Department notes that this provision is intended solely to compensate for forgone uses during the recovery period that would not be compensated for otherwise and thus does not represent double counting. Section 11.84(g) explicitly prohibits double counting. Therefore, the language in § 11.81 has not been modified in this final rule.

One comment disagreed with the Department's distinction, in § 11.81(c)(2), between resource services "with-a-discharge-or-release" and those "previously provided." The comment believes that the text should refer to the

services that would have been expected in the absence of the injury, not to those that existed prior to the injury.

The Department notes that the text in § 11.72, which is referenced in § 11.81(c)(2), describes in detail the quantification procedures that provide the measurement of change in services for the Damage Determination phase. The rule provides guidance as to baseline measurement of conditions that would have been expected at the assessment area had the discharge of oil or release of hazardous substances not occurred. Therefore, the Department believes this comment has misinterpreted the intent of the rule.

Several comments suggested that the distinction made between "private" and "public" uses in § 11.83 was correct and should also be explicitly stated in the restoration methodology section. The Department agrees and has made this change in § 11.81(a).

#### *Section 11.82 Damage Determination phase—Restoration Methodology Plan.*

Several comments disagreed with a statement in the preamble to the proposed rule that stated:

For restoration or replacement, the authorized official should select services for which restoration or replacement is necessary. For a diminution of use value, the authorized official should select services for which clear relationships to human use exist and for which dollar values can be assigned. (December 20, 1985, 50 FR 52133)

These comments suggested that the rule should require the restoration or replacement of all services existing prior to injury, not just those services deemed necessary. Similarly, these comments suggested that all services the injured resource formerly provided to humans, as well as other resources, and those resources for which dollar values cannot be assigned should be considered in determining the diminution of use value. One comment asserted that diminution of use affects other resources that are directly or indirectly dependent upon the injured resource. For example, an oil spill might damage a rookery, killing seals or preventing them from breeding. Although a clear human use and dollar value would be difficult to establish in such a case, the loss to the ecosystem should still be considered when calculating the diminution of use.

The Department agrees that the preamble language requiring only restoration or replacement of "necessary" services may have been misleading. The revised preamble, therefore, reads: "For restoration or replacement, the authorized official has the discretion to select services



provided by the resource, prior to injury, to both humans and other resources." In reference to the comments concerning services without clear human use, the Department believes that only when a service has a human recipient can it be classified as a use per se. The Department notes that services disrupted due to injury to an ecosystem may include those affecting human use because of the indirect nature of the human use, e.g., injury to lower biota that works its way up the food chain can potentially be measured by the "factor income" method listed in § 11.83(d)(2) of this final rule.

Several comments objected to the restriction on land acquisition as a means of restoration, except in those cases where "acquisition constitutes the only viable method of obtaining the lost services."

The Department notes that the restriction on expansion of the Federal estate in the proposed rule has been maintained in this final rule. This restriction limits the Federal authorized official in the acquisition of land unless such acquisition is the only feasible restoration or replacement alternative. Even in this case, funds to acquire the land must be placed in the general fund of the Federal Treasury and requested by the Federal agency through the normal appropriations process. This restriction was placed in the proposed rule after extensive consultation with other Federal agencies. The purpose of this limitation is to limit the acquisition of private lands for Federal management under CERCLA, by eliminating the possibility of expanding the Federal estate without Congressional approval.

Some comments expressed the concern that the 30-day comment period would not give sufficient time for concerned parties to respond to the Restoration Methodology Plan. These comments suggested, instead, that the comment period be 90 days. The Department notes that § 11.82(e)(2)(i) has been modified to state that the comment period will be for at least 30 calendar days, with reasonable extensions granted, as appropriate. The Department believes that the new language will allow authorized officials to tailor the review period to the complexity and level of interest in the Restoration Methodology Plan.

#### *Section 11.83 Damage Determination phase—use value methodologies.*

Several comments supported the inclusion of option and existence values in the proposed rule. Many objected, however, to the limitation on the use of contingent valuation to measure these values in situations where no other

valuation technique will be feasible (§ 11.83(d)(5)). These comments suggested that this limitation may unduly hamper a trustee's ability to accurately and cost-effectively measure option and existence values. Many other comments stated that option and existence values, i.e., non-use values, should be given weight and consideration equal to that given to use values.

On the other hand, many comments expressed concerns about the option and existence values discussed in this section. Several comments contended that the current contingent valuation techniques for measuring option and existence values are not appropriate for inclusion in natural resource damage assessments. One comment stated that contingent valuation techniques to measure option and existence values would be inaccurate and costly as well as subjective and biased, therefore, not appropriate for a litigative setting. In addition, some comments stated that option and existence values would lead to speculative damages and, therefore, should be deleted altogether from the rule.

The Department notes that § 11.83(b) has been changed to explicitly state that option and existence values may be estimated in lieu of use values only when use values cannot be determined. Ordinarily, option and existence values would be added to use values. However, section 301(c) of CERCLA mentions only use values. Therefore, the primary emphasis in this section is on the estimation of use values. The discussion of option and existence values remains in this final rule to take into account those extraordinary circumstances when the authorized official cannot determine a use value for the resource. Only in this very limited circumstance may the authorized official estimate option and existence values.

Another related reason for this limitation is that more is known about the determination of use values than option and existence values. Option and existence values are less well-defined and more uncertainty surrounds their measurement. Because of these reasons, their current use, if the authorized official acting as trustee wishes to obtain a rebuttable presumption, is limited.

In order to further reflect the intent of the proposed rule, the discussion of contingent valuation, § 11.83(d)(5), has been revised. This section now makes clear that contingent valuation is just as valid a method to estimate use values as the other methods listed. However, the use of contingent valuation to explicitly measure option and existence values is

limited, in this final rule, to the situation discussed above.

One comment stated that the three use values listed in § 11.83(b) fail to account for: consumer surplus to consumers of the products from the resource; producer surplus in industries reliant on resource use, such as sport fishing; damages to individuals put out of work who rely on the use of the resource; and impacts beyond producer surplus and income that occur in industries that are impacted by expenditures associated with resource use.

The Department notes that consumer surplus is specifically included in use values, and that producer surplus is included in economic rent, both concepts are listed in § 11.83(b)(1). The last two types of damages listed in the comment are not losses compensable to the authorized official acting as trustee under CERCLA and therefore are outside the scope of this rule.

One comment stated that "fees and other payments," included in § 11.83(b)(1), may not represent the full and appropriate measure of natural resource value. Another comment stated that the words "because the government does not charge a fee or price" should be deleted from § 11.83(b)(1), because the presence of a fee does not necessarily eliminate economic rent, it merely reduces it. The Department agrees with these statements, but points out that these fees are what the government has determined to represent the value of the natural resource and represent an offer by a willing seller.

One comment noted that § 11.83(b)(3) incorrectly implies that the economic effects of damages incurred by government enterprise are different from those described in the previous paragraph for values to the public of recreational or other public uses of a resource. The Department points out that the clause in § 11.83(b)(3) is only meant to minimize the costs of collecting damages that might result from having to bring two law suits for the Government to recover all damages.

Some comments stated that it is unclear why lost taxes, which are payment to the public for use of a common resource, are not recoverable, but lost income from a commercial venture is recoverable. As stated in Section II of this preamble, lost taxes are not recoverable by a Federal or State agency acting on behalf of the trustee because taxes are transfer payments from an individual to the government; they are not recovery for real resource uses.



Many comments asserted that the preference established in the proposed rule for market-based valuation methods is consistent with the common law principle of providing recovery for diminution in market value due to an injury. This regulatory preference among acceptable valuation methods, according to one comment, reduces the likelihood that compensation for speculative damages will be pursued. Conversely, many other comments asserted that compensation based solely on market or appraisal methods may not reflect the full value of the resources. Several of these comments suggested that instead of the proposed rule's strong presumption in favor of market price and appraisal methodologies, the trustee should have the option to use any assessment techniques listed in § 11.83 under any circumstances. Finally, other comments suggested that the rule should require the use of nonmarketed resource methodologies, so long as double counting does not occur.

The Department notes that § 11.83 prescribes an intentional hierarchy among various valuation methods, with one group of methodologies for resources, or resources similar to those injured, that are traded in markets and the other methodologies for resources that are not traded in markets. This hierarchy of methodologies allows the authorized official to assess damages using the "best available procedures." The authorized official must apply the "market price" methodology so long as a "reasonably competitive" market exists for the resource because diminution of the market price is widely recognized by courts and economics as a reasonable measure of damages when a commodity is injured. If the injured resource is not itself traded in a market but similar resources are, and sufficient information is available, the appraisal method must be used. Only when neither of these market-based methods is appropriate should the authorized official use the nonmarketed methodologies listed in § 11.83(d). This hierarchy is based on both the accuracy and ease with which the methodologies are typically employed and reflects a cost-effective approach to reaching a reasonable damage amount. The authorized official is given a choice among the damage determination methodologies. However, to obtain the rebuttable presumption, the choice must be made in accordance with the hierarchy in this rule. If the hierarchy were reversed or eliminated, the Department believes that the tendency would be towards more costly

and less consistent damage determinations.

One comment stated that additional guidance is needed as to the meaning and use of "similar or like resources" traded in a market. The Department points out that similar or like resources can only be determined in the context of the resource in question. Consequently, the authorized official is given the flexibility to make this decision on a case-by-case basis.

Several comments requested more explicit guidance on determining when a market is "reasonably competitive." Other comments asserted that methods utilizing market price should not be limited to the use of markets that are "reasonably competitive." These comments suggested that the only necessary requirement is that the market price and market quantity represent a point on the demand curve. Some comments claimed that the use of market price to estimate damages to a public resource is inappropriate and would result in under- or over-estimating the damages depending on certain market conditions.

The Department notes that, in order to use the marketed resource methodologies (§ 11.83(c)(1)), the authorized official must first determine that the market in which the resource is traded is reasonably competitive. While not defined in this rule, reasonably competitive means that the assumptions underlying a competitive market are fulfilled to a reasonable degree. Because different markets may vary as to what criteria must be met for the market to be reasonably competitive, this determination must be made on a case-by-case basis, therefore further guidance is not provided in this final rule. The Department believes that the reasonably competitive requirement is necessary to ensure that a market price reflects the value of the resource. The Department believes that when markets are reasonably competitive, the market price is a reasonable approximation of the marginal value of the resource.

One comment stated that the authorized official should not be restricted to using nonmarketed methodologies, where available, but should have the choice of either substituting nonmarketed methodologies or using a combination of marketed and unmarketed methodologies. This comment felt that marketed methodologies may not reflect the full societal value of the resource. Other comments were concerned that nonmarketed methodologies, while well-founded in economic theory, are inexact and are surrounded by inherent

uncertainty with limited experience in practical applications.

The Department points out that this rule is not an attempt to totally internalize the costs associated with the use of oils and hazardous substances by assessing the total value to society of the resource. The final rule explicitly does not estimate all losses to private commercial enterprises or any "multiplier" effects. These losses and effects do not accrue to authorized officials acting as trustees and therefore are not considered compensatory to Federal and State agencies under CERCLA. Moreover, private commercial users of the resource have private causes of action.

The Department believes that, besides being well-founded in economic theory, these nonmarketed methodologies have been tested and reviewed in many professional journals and under a wide variety of other circumstances. When used correctly, e.g., along the lines of the Water Resources Council guidelines and the guidance in "Type B Technical Information Document: Techniques to Measure Damages to Natural Resources," which is being prepared to accompany this rule, these methodologies work well and are valid and appropriate measures for determining damages.

One comment requested that an additional handbook, including checklists, be added to the final rule to provide additional guidance on the acceptance criteria for the "selection of economic assessment techniques." The Department believes, however, that the guidance provided is not only adequate, but that further specificity is inappropriate at this time. The authorized official acting as trustee must, within the guidance provided, be allowed to select the economic methodologies on a case-by-case basis.

One comment stated that because marketed resource and appraisal methodologies are best suited to evaluating the entirety of a resource, further guidance was needed to use these methodologies in assessing damages when only a portion of a resource is injured. The comment also requested recognition that the relationship between the portion of the resource affected and the change in value of the resource is not necessarily linear.

The Department does not contend, and did not mean to imply in the proposed rule or in the final rule, that the relationship specified above is linear. In addition, the Department believes that the guidance in "Uniform Appraisal Standards for Federal Land



Acquisition," referenced in this final rule, is adequate for determining a partial loss of a resource.

The same comment asserted that appraisals should not be based on the income method. The Department agrees and maintains that appraisals performed under this final rule should be based only on the comparable sales methodology.

Some comments asserted that nonmarketed resource valuation methodologies contain severe deficiencies and that these methodologies will not result in the reliable, accurate assessments that warrant a rebuttable presumption. In particular, according to some comments, these techniques have no basis in CERCLA, present insurmountable methodological challenges, and are essentially "research techniques." Another comment questioned the validity of the nonmarketed resource methodologies because of a lack of CERCLA court decisions where these methods have been accepted.

Although the Department recognizes the difficulty in determining the value of nonmarketed resources, the methodologies presented in the rule provide a flexible and theoretically sound approach to developing the most accurate assessment possible. The Department realizes that determining damages for some nonmarketed resources may be difficult in some cases, but if injury is determined and quantification is obtained, then some economically sound method should be available for determining damages. The Department notes that section 301(c) of CERCLA recognizes this need by specifically requiring that this rule consider "replacement value, use value, and the ability of the ecosystem to recover" (emphasis added). As difficult as the damage assessment process may be, the methodologies outlined in the rule provide a reasonable approach which uses the "best available procedures" to determine damages, as required by CERCLA. By incorporating the guidance in § 11.84(d), the authorized official can perform an accurate and equitable damage assessment where no market price or appraisal value is available.

In reference to the comment that questioned the nonmarketed methodologies because of the lack of support in the courts, the Department notes that very few court decisions have been reached involving natural resource damage assessments under CERCLA. The fact that there may not be decisions affirming a particular methodology is not reason enough to reject the "best available procedures." The Department

maintains that nonmarketed resource methodologies listed in § 11.83(d) (or others that meet the acceptance criterion) are valid, proven techniques when properly structured and professionally applied.

While acknowledging that the treatment of uncertainty requires reasonable alternative assumptions to be examined, some comments requested that when dealing with uncertainty, the authorized official acting as trustee should avoid choosing a "worst-case" alternative rather than the reasonably probable alternative. The Department notes, however, that it cannot be assumed a priori that a "worst case" alternative is not among the range of reasonable alternatives. Therefore, when a worst case alternative is a reasonable alternative, it should be documented and included in the analysis along with an appropriate estimate of its probability, as required by the rule.

Several comments asserted that the "willingness-to-pay" measure is inadequate for use as an acceptance criterion for nonmarketed natural resource methodologies. A willingness-to-pay test, according to these comments, tends to undervalue the resource and therefore the "willingness-to-accept" measure should generally be used as the basis for valuation. The majority of comments, however, asserted that the willingness-to-accept method should not be used as a way of measuring use value. According to several of these comments, research has suggested that the willingness-to-accept measure distorts the value of a resource and may exceed by three or four times an assessment using the willingness-to-pay criterion. The comments pointed out that less is known about methods to implement the willingness-to-accept criterion than the willingness-to-pay criterion. These comments also pointed out the increased uncertainty that accompanies methodologies that estimate willingness to accept.

The Department maintains that willingness to pay and willingness to accept are both theoretically valid criteria for estimating damages to nonmarketed natural resources. In addition, the Department continues to maintain that willingness to accept may be the criterion most germane to natural resource damages, since the public has the property right to the injured natural resource. However, the Department also agrees with many of the comments that recognize that the application of the willingness-to-accept criterion can lead to more technical difficulties and uncertainties than the willingness-to-pay criterion. In recognition of these

difficulties and of the fact that the authorized official will obtain a rebuttable presumption, the Department, therefore, is modifying the acceptance criteria in § 11.83(d)(7) to include only the willingness-to-pay criterion.

Several comments approved of the general listing of use value methodologies, one stating that the legislative history emphasizes the need for flexible rules that offer trustees a choice of acceptable assessment techniques. Other comments, however, suggested that the list of measurement techniques for nonmarketed resources in § 11.83(d) should be expanded to include methodologies not listed in the rule. Some comments asserted that any list was too restrictive and that the trustee should be free to choose any methodology believed to be appropriate.

The Department believes that no list of nonmarketed resource methodologies would be comprehensive. The rule expands the types of methods that can be used to calculate use values by including nonmarketed methodologies. These methodologies correctly measure the loss of use. The acceptance criterion in § 11.83 is designed to ensure that methodologies consistent with economic theory, yet not specifically listed in the rule, are available for use in estimating damages. The Department has carefully selected the methodologies in the rule because: this rule increases the scope of tools available to authorized officials, and Federal authorized officials will obtain a rebuttable presumption by using this rule.

One comment asserted that for damage determination the analysis "must recognize that the level of injury may vary over time, specify the time period during which injury occurs, and compute damage in relation to both factors as well as the supply and demand for the uses affected." The Department agrees and notes that these factors are already incorporated in §§ 11.64, 11.71, and 11.84.

One comment suggested that guidance should be given as to how choices should be made between cost-effectiveness and theoretical soundness in the use of nonmarketed resource methodologies. The Department recognizes that the trade-off between extra costs and increased precision or accuracy in estimation is a concern in all aspects of a damage assessment. Guidance to help authorized officials make this decision is given in the definitions of "cost-effectiveness" and "reasonable cost" (§ 11.14(j), (ee)).

One comment stated that guidance provided by the Water Resources Council (the Principles and Guidelines



cited in § 11.83(a)(3)) is not necessarily appropriate for the measurement of damages from releases of hazardous substances. The comment asserted there is no indication that these materials have been or are currently being specifically reviewed for applicability, and that the text should therefore be changed from "shall be followed" to "may be followed."

The Department disagrees and has not incorporated this suggestion into the final rule. The Department recognizes that not all guidance in the Principles and Guidelines will be applicable to all discharges and releases; however, the procedures were reviewed prior to their incorporation. Authorized officials acting as trustees are given explicit discretion in § 11.83(a)(3) to determine the guidance applicable to the specific circumstances of the discharge or release. The "Principles and Guidelines" referenced in the rule lay down generally accepted "good practices" that the Department believes are the best publicly available at this time. The rule, and the technical information document, referenced above, also provides general guidance to help authorized officials acting as trustees tailor the use of nonmarketed methodologies to the particular circumstances of the discharge or release.

One comment noted that various Federal and State agencies are developing agency-specific manuals or guides for use in resource damage estimation. This comment stated that the need exists to validate these manuals and to promote comparable techniques. The Department agrees that such a need exists. However, at this time, none of the agency-specific materials mentioned by this comment have been validated, nor have they received the inter-agency ratification of the Principles and Guidelines or the Uniform Appraisal Standards. Consequently, these documents have not been referenced in this final rule.

One comment noted that the Department should require the trustee to make known any assumptions regarding economic methodologies. The Department agrees that all assumptions and data for all elements of the damage assessment should be made known. The Post-assessment phase of the rule now clarifies, in § 11.90(c), that this documentation will be part of the Record of Assessment.

#### *Section 11.84 Damage Determination phase—implementation guidance.*

Several comments suggested that the Department clarify the language in § 11.84(b)(3)(i) so that its applicability is restricted to "committed uses" as

defined in the rule. Other comments stated that no guidance is given as to how to base damages on actual and quantifiable economic losses, rather than speculative losses. The Department believes that clarification of § 11.84(b)(3)(i) is unnecessary. Section 11.84(b)(2) applies to all of § 11.84 and explicitly states that only committed uses can be used to determine damages, thereby precluding consideration of speculative uses. In addition, the definition of committed use explicitly states the conditions required for any use to be considered a committed use. The Department believes that further guidance on this issue is not required.

Several comments were received on the non-mutually exclusive services language in § 11.84(b)(3) (i) and (ii). Many individuals found this language confusing. The intent of this section was to incorporate potential congestion or crowding out effects, if any. This language has been changed to explicitly state this intention.

Several comments raised concerns about quantifying uncertainties, such as uncertain or incorrect information regarding the resource, in the Damage Determination phase of the assessment. One comment noted that the proposed rule attempts to deal with the problem of uncertainty by requiring that net expected present value be calculated for various damage estimates, this comment suggested that the rule should provide guidance as to how the trustee or potentially responsible party can develop realistic estimates of the probabilities of that calculation.

The Department notes that the rule provides a broad framework for incorporating uncertainty into the damage determination methodologies. Section 11.84(d) requires that when there are significant uncertainties concerning the implementation of a damage methodology, uncertainty should be examined explicitly in the assessment analysis and the assumptions used in the methodology should be documented.

Section 11.84(d) has been revised to make explicit that quantitative uncertainties in all aspects of the damage assessment can be reflected in the Damage Determination phase. This was the original intent of the proposed rule; however, the comments received on this section made it clear that this purpose was not explained well in the proposed rule. Because the sole purpose of a damage assessment is to derive a dollar value for compensation for injury to a natural resource, the Damage Determination phase is the proper place to explicitly incorporate uncertainties in the analysis. The requirement to select the net expected present value of

damages will incorporate the uncertainty while allowing the authorized official the ability to present to the potentially responsible party a specific damage claim. In this regard it should be remembered that Congress defined a claim in section 101(4) of CERCLA as "a demand in writing for a sum certain." The requirements in § 11.84(d) of this rule allow the authorized officials to use alternative assumptions in all phases of the damage assessment and still derive a single sum to present to the potentially responsible party. The Department is aware that the guidance for incorporating uncertainty (using net expected present value) is not specific; however, more specific guidance cannot be set forth, given the variety of assumptions used in the different Assessment Plan methodologies.

Several comments were received on the discount rate procedure specified in the proposed rule. The discount rate in the proposed rule, § 11.84(e), is given in OMB Circular A-94 as a real rate of 10 percent. Some comments stated that the 10 percent real rate was too high. Others thought that the rate was appropriate for discounting damages. One comment suggested that 10 percent is a reasonable discount rate for determining damages under the proposed rule, but that if pre-judgment interest is charged, within the context of the rule, this rate would be too high. The 10 percent rate was selected after extensive inter-agency consultation and has been retained in this final rule.

It should be noted that the Department has not specified whether pre-judgment interest should be included in any court award, and consequently has not specified a rate of interest for determining this amount. The award of pre-judgment interest is a determination to be made in the courts, not in this rule.

Another comment interpreted the rule to say that natural resource damages are not recoverable unless they can be strictly and thoroughly quantified and qualified. This comment pointed out that damage determination is not an exact science, therefore the rule is not precise. The Department believes that this rule provides the "best available procedures" to determine injury, quantify the effects of that injury, and determine damages based upon that injury as required under CERCLA. As such, the final rule does provide for the quantification of injury and the assignment of a monetary value of compensation for the injury. The Department recognizes that damage determination is not an exact science; no science is exact. However, CERCLA



provides for recovery of a "sum certain." The rule attempts to derive this "sum certain" by incorporating the uncertainty and by determining the expected net present value of the damages (i.e., a quantification of the measurement of inexactness), as discussed above.

Several comments disagreed with the language of proposed § 11.84(f), which requires that estimates of the ability of the public to substitute uses for those of the injured services should be incorporated in calculating the diminution of use values. These comments suggested that the substitution provision would result in an inadequate assessment of damages.

The Department believes that the substitutability provision in § 11.84(f) should not be changed, because it improves the accuracy of the assessment of damages for nonmarketed resources. The market price of a resource already takes into consideration the ease with which another resource may be substituted for the damaged resource. For nonmarketed resource methodologies, the substitutability provision captures this variable, and thus the assessment better reflects the value of the resource. The effect of the provision may be to "lower" or "raise" the estimated value depending on the relative availability of substitute services. Moreover, an estimate of substitutability need not be included in all nonmarketed resource methodologies; the rule states: "This substitutability shall be estimated, only if the potential benefits from an increase in accuracy are greater than the potential costs."

One comment stated that, in determining a compensatory level of damages, the rule must account for the net diminishment in the flow of services from the type of natural resource that has been injured.

The Department agrees with this comment, but believes no additional language change is required. The language in § 11.84(f), on substitutability, encompasses this concept.

Several comments felt that § 11.84(i) (1) and (2) preclude the authorized official acting as trustee from assessing damages on a local level and should be deleted. Other comments felt that § 11.84(i) should be revised to expressly include direct, indirect, and induced regional economic impacts.

The Department does not feel § 11.84(i) (1) and (2) should be deleted since the scope of the assessment depends upon the trusteeship involved. Also, these sections explicitly do not include indirect or induced impacts, i.e., multiplier effects. As stated above, such

impacts are private losses and, as such, are outside the scope of this rule.

#### *F. Revisions to Subpart F—Post-Assessment Phase*

##### *Section 11.90 Post-assessment phase—Report of Assessment.*

One comment suggested that §§ 11.90(b) and 11.91(c) be modified so that the references to the "administrative record" are consistent. In the proposed rule, § 11.91(c) indicated that the administrative record may consist of more than the Report of Assessment, whereas § 11.90(b) stated that the Report of Assessment constitutes the administrative record.

Section 11.90 has been revised to delete paragraph (b) of the proposed rule. The Report of Assessment shall contain all the elements listed in § 11.90(a), however, the full administrative record of assessment could contain other documents relating to the performance and circumstances of the assessment.

Comments suggested that all other agencies acting as trustees and the public be provided an opportunity to review and comment upon the damage determination and the Report of Assessment before the lead authorized official presents the demand to the responsible party.

The Department believes that the rule already requires close coordination and review among all agencies acting as trustees at every step of the assessment. Public review and comments, however, would not be appropriate, immediately before the demand is presented. Public availability of the demand and the Report of Assessment after it is presented would certainly be appropriate. The Restoration Plan for the use of monies awarded is subject to public review and comment.

One comment held that the rule should explicitly provide that natural resource damage assessments will not be reviewed under an "arbitrary and capricious" standard of judicial review. The Department believes that it is beyond the scope of this rule to establish the judicial standards for review.

##### *Section 11.91 Post-assessment phase—Demand.*

One comment recommended that the word "reasonable," in § 11.91(a), either be omitted from the discussion of reimbursement for the cost of conducting assessments or be accompanied by regulatory guidelines for interpreting the term. The Department notes that "reasonableness" is a statutory requirement, found in

section 107(a)(4)(C) of CERCLA. The final rule, however, does provide additional guidance on what would be considered reasonable costs.

##### *Section 11.92 Post-assessment phase—Restoration account.*

Several comments opposed the requirement that damages awarded as the result of an assessment be used solely for restoration or replacement purposes, and challenged the Department's authority to impose such a requirement. One comment expressed the concern that since damages may often be recovered on the basis of the diminution of use value, the requirement that damages awarded be used solely for restoration or replacement might be sufficient only for partial restoration or replacement.

The Department believes that the language of CERCLA requires that all sums recovered as damages either through court awards or negotiated settlements be used for restoration or replacement of the resource. If restoration or replacement of the specific resource injured is not feasible, the funds may be used to restore or replace similar or like resources. If damages were determined on the basis of lost use value, those sums should still be used for restoration or replacement efforts. The Department notes that a trustee agency is always free to restore beyond an amount representing lost use values if desired by supplementing the damage award. The Department has added language to clarify that claims against the Hazardous Substance Response Trust Fund must be for those expenses specified in EPA's Natural Resource Claims Procedures, 40 CFR 306.

One comment suggested that the rule include a method for dividing the damage award when natural resources under the jurisdiction of two or more trustees are injured. Because the circumstances where co-trustees are involved could be so varied and numerous, the Department believes that it would be inappropriate for the rule to govern how the damage award should be apportioned between trustees.

One comment recommended that § 11.92(b) be deleted entirely. The comment felt that the requirement that funds for land acquisition be deposited into the U.S. Treasury rather than into a trust authorized to acquire land violates section 107(f) of CERCLA.

The Department does not agree that § 11.92(b) of the rule violates section 107(f) of CERCLA. It merely requires Federal authorized officials to use existing Federal appropriations



procedures when attempting to acquire additional land for Federal management.

One comment maintained that the establishment of a restoration account and a Restoration Plan infringes on the authority of State trustees to recover damages from potentially responsible parties. Another comment objected to the requirement that all damage awards except those for land acquisition be held in a separate account, pending restoration planning. The comment suggested that damages be made directly available to the trustee for restoration rather than being held in a trust fund subject to the administration of EPA. The Department notes that damages are to be made directly available to the authorized official for restoration. The rule does not require that monies be placed in a trust fund subject to EPA administration.

One comment suggested that the trustee be allotted a specific period of time during which the trustee must implement and complete the Restoration Plan, or else return the funds not used for restoration. The comment felt that such a provision would assure that funds are used for restoration, as CERCLA intended.

The Department believes that the requirements of § 11.92(e) are sufficient to assure that damage awards are used solely for activities described in the Restoration Plan. Time periods for completion of Restoration Plan actions could vary to an extent that any set time would not be appropriate.

Another comment urged that a fund be established to lend Federal and State trustees monies necessary to perform the assessment with repayment of the loan required upon receipt of the damage award.

The Department notes that the establishment of such a fund is beyond the scope of this rule.

Section 11.92(d), *Adjustments*, has been rewritten. The proposed rule anticipated that a potentially responsible party would set up an interest bearing account from which the authorized official acting as trustee would draw to effectuate the restoration or replacement. Because the account accrued interest, there was no need to explicitly adjust for inflationary effects. The majority of these effects would be eliminated by the accrued interest over the period of time required to complete the restoration or replacement. After extensive interagency consultation, it was determined that all monies awarded to the Federal Government should go into non-interest bearing accounts in the Federal Treasury. This procedure requires an adjustment to the rule to take into consideration

anticipated inflationary effects. The adjustment in this final rule requires that the damage amount going into non-interest bearing accounts be adjusted by the rate payable on Federal notes and bonds with a maturity that approximates the length of time required to complete the restoration. This procedure is not meant to provide a windfall for authorized officials, but simply meant to adjust for effects of inflation when the restoration or replacement is expected to occur over a long period of time.

#### G. Revisions to Appendix I to Part 11

Numerous comments noted the typographical errors that appeared in the Appendix to the proposed rule. Rather than detailing the corrections, the Department is reprinting a corrected version of the Appendix.

The Department also notes that the authorized official may use the methods in Appendix I only "for estimating, as required in § 11.25 of this part, the areas of exposure of ground water or surface water . . ." (emphasis added). Any other use of the methods or factors listed in Appendix I is inappropriate for natural resource damage assessments (see § 11.25(c)).

Several comments suggest that in Table 1 of Appendix 1 the flow units are too high and would result in predicting a much larger area of contamination than would really exist. The comments suggest that an average value, rather than a worst case value, would be more appropriate. The Department does not agree that the flow units of this factor are too high; the values are mean values derived from data presented in "Groundwater" by Freeze & Cherry (1979), tables 2.2 and 2.4. Because the factors are mean values (i.e., averages) the Department agrees that the factors given may over- or under-estimate the area of contamination.

#### IV. Special Resources

##### A. The Concept of Special Resources

In the December 20, 1985 Notice of Proposed Rulemaking (50 FR 52126) the Department proposed that an exception to the general common law rule that damages are the lesser of: restoration or replacement costs; or the diminution of use values. This exception covered a narrow class of resources called "special resources." This exception was set forth in § 11.35(d) of the proposed rule. The authorized official acting as trustee could elect to use restoration or replacement costs as the measure of damages when a special resource was injured, so long as the restoration or

replacement costs were not "grossly disproportionate to the benefits gained."

Special resources were defined in the proposed rule, § 11.14(pp), as:

. . . those resources that have been set aside and committed to a specific use by law before the discharge of oil or release of a hazardous substance was detected. The term includes resources that were set aside primarily to preserve wildlife habitat or other unique and sensitive environments. It does not include resources that have been set aside but are committed to multiple-use management, nor does it include resources listed on administratively determined lists for special protection, or resources protected by regulatory statutes.

The intent of this concept was to create a very narrow exception to the general common law definition of damages to address situations where Congress or State legislatures have determined that certain natural resources are worthy of protection even if their use values are relatively low. The Department reasoned that if agencies were held to the strict rule of the lesser of: restoration or replacement costs; or a diminution of use values, some of these resources could be left unrestored or unreplaced to the level of their original protection, thereby being contrary to Congressional or a State legislature's intent.

##### B. Comments Received

Many comments on the proposed rule expressed strong objections to the definition of special resources as proposed, others objected to the existence of the exception altogether.

Several comments stated that the proposed definition of "special resources" was too narrow, and would unduly restrict the trustee's authority to choose which resources would warrant damages for full restoration or replacement costs. These comments suggested that the definition be broadened to include marine and estuarine sanctuaries, multiple-use lands, areas of critical environmental concern, and other resources designated by trustees.

A number of comments argued that species that are listed as threatened or endangered pursuant to the Endangered Species Act, as well as their critical habitats, should be treated as special resources. The comments asserted that the exclusion of these species from the special resources category would be both unwise and, because of the provisions of section 7 of the Endangered Species Act, unlawful.

Other comments maintained that the provisions relating to special resources were too vague, and would give trustees too much discretion in determining what



a special resource is and what would be reasonable costs for the restoration or replacement of a special resource.

Still other comments argued that there is no provision in CERCLA or its legislative history that allows such a departure from the normal common-law standard of damage calculation. In addition, the comments argued that allowing State law to determine what are special resources would result in inconsistent application of CERCLA on a State-by-State basis.

### C. Response to Comments

Because of the diversity of the comments received, the Department has determined that it would be best to take a closer look at the concept of special resources before making it a part of this final rule. Therefore, the Department has decided at this time that the special resources exception should be deleted from this final rule. The Department takes this action after reviewing the public comments received on this issue and deciding that there is a need to reexamine the special resources concept generally as well as the appropriate scope of the exception. Further, there is no real "on the ground" experience in the use of these rules. The Department is uncertain as to how this exception would function with the more general rules for assessing damages, whether the exception would result in inappropriate cost shifting, or whether the exception would actually result in the further protection of these resources. The Department has concluded that the concept deserves further consideration.

To assist in the Department's reconsideration of the special resources exception, the Department is requesting additional public comment concerning the exception in conducting type B natural resource damage assessments. The comments should address three major issues. First, should there be an exception to the general common law definition of damages for special resources? Second, if there is an exception for special resources what natural resources should be included in the definition of special resources? Third, what is the rational basis for including some natural resources and excluding others from the classification of special resources?

The Department, if necessary, will implement any changes as a result of the review and consideration of public comments received on this issue by amending this final rule.

Comments on this issue will be accepted for a period of 60 days after the date of publication of this rule. Comments should be sent to Keith Eastin, CERCLA 301 Project Director,

Department of the Interior, 1801 "C" Street NW, Room 4354, Washington, DC 20240.

### Authorship

The primary authors of this rulemaking are Keith Eastin, Deputy Under Secretary, Alison Ling, Office of the Solicitor, David Rosenberger and Peter Escherich, U.S. Fish and Wildlife Service, Stan Coloff, Bureau of Land Management, Willie Taylor, Office of Policy Analysis, and Craig Sprinkle, U.S. Geological Survey, all with the Department of the Interior, Sheryl Katz, formerly with the Office of the Solicitor, and Richard Aiken, formerly with the Bureau of Land Management, Department of the Interior. Significant contributions to this rulemaking were made by Linda Burlington, Office of the Solicitor, and Karla Jamir, Office of the Assistant Secretary for Policy, Budget, and Administration, both with the Department of the Interior.

### NEPA, E.O. 12291, and Paperwork Reduction Act Requirements

The Department has determined that this rule is eligible for a categorical exclusion under the National Environmental Policy Act (NEPA). Departmental NEPA procedures (516DM2, Appendix 1.10) provide for a categorical exclusion for regulations of an administrative, financial, legal, technical, or procedural nature; or for regulations for which the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis, or when those effects will be subject later to the NEPA process, whether collectively or case by case.

The promulgation of this rule does not constitute a significant Federal action affecting the environment in and of itself. The rule only applies to natural resources potentially injured by discharges or releases of oil or hazardous substances. Except in emergencies, before any restoration action could be taken relevant to the natural resources that are the subjects of this rule, a damage assessment must be conducted, a claim must be filed, an award must be made, and a Restoration Plan or comparable planning document with public input must be approved.

Requirements that encompass the kinds of information the authorized official acting as trustee must provide in the course of the restoration planning activity are described in this rule in § 11.82. This information has been designed to fulfill the same information requirements as NEPA, with equivalent opportunities for public input. Thus if an EA or EIS were determined to be

necessary for any particular restoration or other activity planned in satisfaction of a particular claim, appropriate and timely information would be available.

No comments addressing this matter were received during the public comment period on the proposed rule.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule provides technical and procedural guidance for the assessment of damages to natural resources. Therefore, the rule does not directly impose any additional cost. In addition, estimates of per unit assessment costs times the potential numbers of assessments total well below \$100 million annually. The rule applies to Federal and State agencies acting as trustees for natural resources and is thus not expected to have an effect on a substantial number of small entities.

It has been determined that this rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

### List of Subjects in 43 CFR Part 11

Continental shelf, Environmental protection, Fish, Forests and forest products, Grazing land, Incorporation by reference, Indian lands, Hazardous substances, Mineral resources, National forest, National parks, Natural resources, Oil pollution, Public lands, Wildlife, Wildlife refuges.

Under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for the reasons set out in the preamble, Title 43, Subtitle A of the Code of Federal Regulations is amended by adding a new Part II as set forth below.

Dated: June 23, 1986.

Keith E. Eastin,  
Deputy Under Secretary.

## PART 11—NATURAL RESOURCE DAMAGE ASSESSMENTS

### Subpart A—Introduction

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Appendix I to Part 11—Methods for Estimating the Areas of Ground Water and Surface Water Exposure During the Preassessment Screen

Authority: 42 U.S.C. 9651(c).

**Subpart A—Introduction****§ 11.10 Scope and applicability.**

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601–9657, and the Clean Water Act (CWA), 33 U.S.C. 1251–1376, provide that Federal and State agencies who are authorized to act as trustees of natural resources may assess damages to natural resources resulting from a discharge of oil or a release of a hazardous substance covered under CERCLA or the CWA and may seek to recover those damages. This part supplements the procedures established under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR 300, for the identification, investigation, study, and response to a discharge of oil or release of a hazardous substance, and it provides a procedure by which a Federal or State agency acting as trustee can determine compensation for injuries to natural resources that have not been nor are expected to be addressed by response actions conducted pursuant to the NCP. The assessment procedures set forth in this part are not mandatory. However, they must be used by Federal officials acting as trustees in order to obtain the rebuttable presumption contained in section 111(h) of CERCLA. This part applies to assessments initiated after September 2, 1986.

**§ 11.11 Purpose.**

The purpose of this part is to provide standardized and cost-effective procedures for assessing natural resource damages. The results of an assessment performed by a Federal official according to these procedures shall be accorded the evidentiary status of a rebuttable presumption as provided in section 111(h) of CERCLA.

**§ 11.12 Biennial review of regulations.**

The regulations and procedures included within this part shall be reviewed and revised as appropriate 2 years from the effective date of these rules and every second anniversary thereafter.

**§ 11.13 Overview.**

(a) *Purpose.* The process established by this part uses a planned and phased approach to the assessment of natural resource damages. This approach is designed to ensure that all procedures used in an assessment, performed pursuant to this part, are appropriate, necessary, and sufficient to assess damages for injuries to natural resources.

(b) *Preassessment phase.* Subpart B of this part, the preassessment phase, provides for notification, coordination, and emergency activities, if necessary, and includes the preassessment screen. The preassessment screen is meant to be a rapid review of readily available information that allows the authorized official to make an early decision on whether a natural resource damage assessment can and should be performed.

(c) *Assessment Plan phase.* If the authorized official decides to perform an assessment, an Assessment Plan, as described in Subpart C of this part, is prepared. The Assessment Plan ensures that the assessment is performed in a planned and systematic manner and that the methodologies chosen demonstrate reasonable cost.

(d) *Type A assessments.* The simplified assessments provided for in section 301(c)(2)(A) of CERCLA are performed using the standard procedures specified in Subpart D of this part.

(e) *Type B assessments.* Subpart E of this part covers the assessments provided for in section 301(c)(2)(B) of CERCLA. The process for implementing type B assessments has been divided into the following three phases.

(1) *Injury Determination phase.* The purpose of this phase is to establish that one or more natural resources have been injured as a result of the discharge of oil or release of a hazardous substance. The sections of Subpart E comprising the Injury Determination phase include definitions of injury, guidance on determining pathways, and testing and sampling methods. These methods are to be used to determine both the pathways through which resources have been exposed to oil or a hazardous substance and the nature of the injury.

(2) *Quantification phase.* The purpose of this phase is to establish the extent of the injury to the resource in terms of the loss of services that the injured resource would have provided had the discharge or release not occurred. The sections of Subpart E comprising the Quantification phase include methods for establishing baseline conditions, estimating recovery periods, and measuring the degree of service reduction stemming from an injury to a natural resource.

(3) *Damage Determination phase.* The purpose of this phase is to establish the appropriate compensation expressed as a dollar amount for the injuries established in the Injury Determination phase and measured in the Quantification phase. The sections of Subpart E comprising the Damage Determination phase include guidance



on acceptable economic methodologies for estimating compensation based on: the costs of restoration or replacement; or a diminution of use value.

(f) *Post-assessment phase.* Subpart F of this part includes requirements to be met after the assessment is complete. The Report of Assessment contains the results of the assessment, and documents that the assessment has been carried out according to this rule. Other post-assessment requirements delineate the manner in which the demand for a sum certain shall be presented to a responsible party and the steps to be taken when sums are awarded as damages.

#### § 11.14 Definitions.

Terms not defined in this section have the meaning given by CERCLA or the CWA. As used in this part, the phrase:

(a) "Acquisition of the equivalent" or "replacement" means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP, 40 CFR 300.65 and 300.68.

(b) "Air" or "air resources" means those naturally occurring constituents of the atmosphere, including those gases essential for human, plant, and animal life.

(c) "Assessment area" means the area or areas within which natural resources have been affected directly or indirectly by the discharge of oil or release of a hazardous substance and that serves as the geographic basis for the injury assessment.

(d) "Authorized official" means the Federal or State official to whom is delegated the authority to act on behalf of the Federal or State agency acting as trustee to perform a natural resource damage assessment. As used in this part, authorized official is equivalent to the phrase "authorized official or lead authorized official," as appropriate.

(e) "Baseline" means the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred.

(f) "Biological resources" means those natural resources referred to in section 101(16) of CERCLA as fish and wildlife and other biota. Fish and wildlife include marine and freshwater aquatic and terrestrial species; game, nongame, and commercial species; and threatened, endangered, and State sensitive species.

Other biota encompass shellfish, terrestrial and aquatic plants, and other living organisms not otherwise listed in this definition.

(g) "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

(h) "Committed use" means either: a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the discharge of oil or release of a hazardous substance is detected.

(i) "Control area" or "control resource" means an area or resource unaffected by the discharge of oil or release of the hazardous substance under investigation. A control area or resource is selected for its comparability to the assessment area or resource and may be used for establishing the baseline condition and for comparison to injured resources.

(j) "Cost-effective" or "cost-effectiveness" means that when two or more activities provide the same or a similar level of benefits, the least costly activity providing that level of benefits will be selected.

(k) "CWA" means the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*, also referred to as the Federal Water Pollution Control Act.

(l) "Damages" means the amount of money sought by the Federal or State agency acting as trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA.

(m) "Destruction" means the total and irreversible loss of a natural resource.

(n) "Discharge" means a discharge of oil as defined in section 311(a)(2) of the CWA, as amended, and includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of oil.

(o) "Drinking water supply" means any raw or finished water source that is or may be used by a public water system, as defined in the SDWA, or as drinking water by one or more individuals.

(p) "EPA" means the United States Environmental Protection Agency.

(q) "Exposed to" or "exposure of" means that all or part of a natural resource is, or has been, in physical contact with oil or a hazardous substance, or with media containing oil or a hazardous substance.

(r) "Fund" means the Hazardous Substance Response Trust Fund established under section 221 of CERCLA.

(s) "Geologic resources" means those elements of the Earth's crust such as soils, sediments, rocks, and minerals, including petroleum and natural gas, that are not included in the definitions of ground and surface water resources.

(t) "Ground water resources" means water in a saturated zone or stratum beneath the surface of land or water and the rocks or sediments through which ground water moves. It includes ground water resources that meet the definition of drinking water supplies.

(u) "Hazardous substance" means a hazardous substance as defined in section 101(14) of CERCLA.

(v) "Injury" means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of a hazardous substance, or exposure to a product of reactions resulting from the discharge of oil or release of a hazardous substance. As used in this part, injury encompasses the phrases "injury," "destruction," and "loss." Injury definitions applicable to specific resources are provided in § 11.62 of this part.

(w) "Lead authorized official" means a Federal or State official authorized to act on behalf of all affected Federal or State agencies acting as trustees where there are multiple agencies affected because of coexisting or contiguous natural resources or concurrent jurisdiction.

(x) "Loss" means a measurable adverse reduction of a chemical or physical quality or viability of a natural resource.

(y) "Natural Contingency Plan" or "NCP" means the National Oil and Hazardous Substances Contingency Plan and revisions promulgated by EPA, pursuant to section 105 of CERCLA and codified in 40 CFR Part 300.

(z) "Natural resources" or "resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976), any State or local government, or any foreign government. These natural resources have been categorized into the following five groups: surface water resources, ground water resources, air resources, geologic resources, and biological resources.



(aa) "Natural resource damage assessment" or "assessment" means the process of collecting, compiling, and analyzing information, statistics, or data through prescribed methodologies to determine damages for injuries to natural resources as set forth in this part.

(bb) "Oil" means oil as defined in section 311(a)(1) of the CWA, as amended, of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

(cc) "On-Scene Coordinator" or "OSC" means the On-Scene Coordinator as defined in the NCP, 40 CFR 300.6.

(dd) "Pathway" means the route or medium through which oil or a hazardous substance is or was transported from the source of the discharge or release to the injured resource.

(ee) "Reasonable cost" means the amount that may be recovered for the cost of performing a damage assessment. Costs are reasonable when: the Injury Determination, Quantification, and Damage Determination phases have a well-defined relationship to one another and are coordinated; the anticipated increment of extra benefits in terms of the precision or accuracy of estimates obtained by using a more costly injury, quantification, or damage determination methodology are greater than the anticipated increment of extra costs of that methodology; and the anticipated cost of the assessment is expected to be less than the anticipated damage amount determined in the Injury, Quantification, and Damage Determination phases.

(ff) "Rebuttable presumption" means the procedural device provided by section 111(h) of CERCLA describing the evidentiary weight that a court, or EPA in a claim against the Fund, is required to give a damage assessment performed by a Federal agency acting as trustee in accordance with the regulations provided in this part.

(gg) "Recovery period" means either the longest length of time required to return the services of the injured resource to their baseline condition, or a lesser period of time selected by the authorized official and documented in the Assessment Plan.

(hh) "Release" means a release of a hazardous substance as defined in section 101(22) of CERCLA.

(ii) "Replacement" or "acquisition of the equivalent" means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any

substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP, 40 CFR 300.65 and 300.68.

(jj) "Response" means remove, removal, remedy, or remedial actions as those phrases are defined in sections 101(23) and 101(24) of CERCLA.

(kk) "Responsible party or parties" and "potentially responsible party or parties" means a person or persons described in or potentially described in one or more of the categories set forth in section 107(a) of CERCLA.

(ll) "Restoration" or "rehabilitation" means actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it previously provided, when such actions are in addition to response actions completed or anticipated, and when such actions exceed the level of response actions determined appropriate to the site pursuant to the NCP, 40 CFR 300.65 and 300.68.

(mm) "SDWA" means the Safe Drinking Water Act, 42 U.S.C. 300f-300j-10.

(nn) "Services" means the physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource.

(oo) "Site" means an area or location, for purposes of response actions under the NCP, at which oil or hazardous substances have been stored, treated, discharged, released, disposed, placed, or otherwise came to be located.

(pp) "Surface water resources" means the waters of the United States, including the sediments suspended in water or lying on the bank, bed, or shoreline and sediments in or transported through coastal and marine areas. This term does not include ground water or water or sediments in ponds, lakes, or reservoirs designed for waste treatment under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901-6987 or the CWA, and applicable regulations.

(qq) "Technical feasibility" or "technically feasible" means that the technology and management skills necessary to implement an Assessment Plan or Restoration Methodology Plan are well known and that each element of the plan has a reasonable chance of successful completion in an acceptable period of time.

(rr) "Trustee" means any Federal natural resources management agency designated in the NCP, 40 CFR Subpart

G, and any State agency that may prosecute claims for damages under section 107(f) or 111(b) of CERCLA.

(ss) "Type A assessment" means standard procedures for simplified assessments requiring minimal field observation to determine damages as specified in section 301(c)(2)(A) of CERCLA.

(tt) "Type B assessment" means alternative methodologies for conducting assessments in individual cases to determine the type and extent of short- and long-term injury and damages, as specified in section 301(c)(2)(B) of CERCLA.

#### **§ 11.15 Actions against the responsible party for damages.**

(a) In an action filed pursuant to section 107(f) of CERCLA or section 311(f) (4) and (5) of the CWA, a Federal or State agency acting as a trustee who has performed an assessment in accordance with this rule may recover:

(1) Damages as determined in accordance with:

(i) Subpart D; or

(ii) As determined in accordance with §§ 11.80 through 11.84 of this part and calculated based on injuries occurring from the onset of the discharge or release through the recovery period, less any mitigation of those injuries by response actions taken or anticipated, plus any increase in injuries that are reasonably unavoidable as a result of response actions taken or anticipated;

(2) The costs of emergency restoration efforts under § 11.21 of this part; and

(3) The reasonable and necessary costs of the assessment, to include:

(i) The cost of performing the preassessment and Assessment Plan phases and the methodologies provided in Subpart D or E of this part; and

(ii) Administrative costs and expenses necessary for, and incidental to, the assessment, assessment and restoration planning, and any restoration or replacement undertaken.

(b) The determination of the damage amount shall consider any applicable limitations provided for in section 107(c) of CERCLA.

(c) Where an assessment determines that there is, in fact, no injury, as defined in § 11.62 of this part, the Federal or State agency acting as trustee may not recover assessment costs.

#### **§ 11.16 Claims against the Hazardous Substance Response Trust Fund.**

Claims against the Fund shall be filed in accordance with the Natural Resource Claims Procedures, 40 CFR Part 306.



**§ 11.17 Compliance with applicable laws and standards.**

(a) *Worker health and safety.* All worker health and safety considerations specified in the NCP, 40 CFR 300.38, shall be observed, except that requirements applying to response actions shall be taken to apply to the assessment process.

(b) *Resource protection.* Before taking any actions under this part, particularly before taking samples or making determinations of restoration or replacement, compliance is required with any applicable statutory consultation or review requirements, such as the Endangered Species Act; the Migratory Bird Treaty Act; the Marine Protection, Research, and Sanctuaries Act; and the Marine Mammal Protection Act, that may govern the taking of samples or in other ways restrict alternative management actions.

**§ 11.18 Incorporation by reference.**

(a) The following publications or portions of publications are incorporated by reference:

(1) Part II only (Fish-Kill Counting Guidelines) of "Monetary Values of Freshwater Fish and Fish-Kill Guidelines," American Fisheries Society Special Publication Number 13, 1982; available for purchase from the American Fisheries Society, 5410 Grosvenor Lane, Bethesda, MD 20814, ph: (301) 897-8616. Reference is made to this publication in §§ 11.62(f)(4)(i)(B) and 11.71(l)(5)(iii)(A) of this part.

(2) Appendix 1 (Travel Cost Method), Appendix 2 (Contingent Valuation (Survey) Methods), and Appendix 3 (Unit Day Value Method) only of Section VIII of "National Economic Development (NED) Benefit Evaluation Procedures" (Procedures), which is Chapter II of *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies*, U.S. Department of the Interior, Water Resources Council, Washington, DC, 1984, DOI/WRC/-84/01; available for purchase from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161; PB No. 84-199-405; ph: (703) 487-4650. Reference is made to this publication in § 11.83(a)(3) of this part.

(3) "Uniform Appraisal Standards for Federal Land Acquisition" (Uniform Appraisal Standards), Interagency Land Acquisition Conference, Washington, DC, 1973; available for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; Stock Number 052-059-00002-0; ph: (202) 783-3238.

Reference is made to this publication in § 11.83(c)(2)(i) of this part.

(b) The publications or portions of publications listed in paragraph (a) of this section are available for inspection at the Office of the Federal Register, 1100 L Street, NW., Washington, DC 20408. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a). These materials are incorporated as they exist on the date of the approval and a notice of any change in these materials will be published in the Federal Register.

**Subpart B—Preassessment Phase****§ 11.20 Notification and detection.**

(a) *NCP responses.* The NCP at 40 CFR 300.52(d) and 300.64(d) provides for the OSC or lead agency to notify the Federal or State agency acting as trustee when natural resources have been or are likely to be injured by a discharge of oil or a release of a hazardous substance being investigated under the NCP.

(b) *Previously unreported discharges or releases.* If a Federal or State agency acting as trustee identifies or is informed of apparent injuries to natural resources that appear to be a result of a previously unidentified or unreported discharge of oil or release of a hazardous substance, he should first make reasonable efforts to determine whether a discharge or release has taken place. In the case of a discharge or release not yet reported or being investigated under the NCP, the Federal or State agency acting as trustee shall report that discharge or release to the appropriate authority as designated in the NCP, 40 CFR 300.51(b) and 300.63(b).

(c) *Identification of co-trustees.* The Federal or State agency acting as trustee should assist the OSC or lead agency, as needed, in identifying other Federal or State agencies whose resources may be affected as a result of shared responsibility for the resources and who should be notified.

**§ 11.21 Emergency restorations.**

(a) *Reporting requirements and definition.* (1) In the event of a natural resource emergency, the Federal or State agency acting as trustee shall contact the National Response Center (800/424-8802) to report the actual or threatened discharge or release and to request that an immediate response action be taken.

(2) An emergency is any situation related to a discharge or release requiring immediate action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources, or a

situation in which there is a similar need for emergency action.

(b) *Emergency actions.* If no immediate response actions are taken at the site of the discharge or release by the EPA or the U.S. Coast Guard within the time that the Federal or State agency acting as trustee determines is reasonably necessary, or if such actions are insufficient, the Federal or State agency acting as trustee should exercise any existing authority it may have to take on-site response actions. The Federal or State agency acting as trustee shall determine whether the potentially responsible party, if his identity is known, is taking or will take any response action. If no on-site response actions are taken, the Federal or State agency acting as trustee may undertake limited off-site restoration action consistent with their existing authorities to the extent necessary to prevent or reduce the immediate migration of the oil or hazardous substance onto or into the resource for which the Federal or State agency may assert trusteeship.

(c) *Limitations on emergency actions.* The Federal or State agency acting as trustee may undertake only those actions necessary to abate the emergency situation. The normal procedures provided in this part must be followed before any additional restoration actions other than those necessary to abate the emergency situation are undertaken. The burden of proving that emergency restoration was required and that restoration costs were reasonable and necessary based on information available at the time rests with the Federal or State agency acting as trustee.

**§ 11.22 Sampling of potentially injured natural resources.**

(a) *General limitations.* Until the authorized official has made the determination required in § 11.23 of this part to proceed with an assessment, field sampling of natural resources should be limited to the conditions identified in this section. All sampling and field work shall be subject to the provisions of § 11.17 of this part concerning safety and applicability of resource protection statutes.

(b) *Early sampling and data collection.* Field samples may be collected or site visits may be made before completing the preassessment screen to preserve data and materials that are likely to be lost if not collected at that time and that will be necessary to the natural resource damage assessment. Field sampling and data collection at this stage should be coordinated with the lead agency under



the NCP to minimize duplication of sampling and data collection efforts. Such field sampling and data collection should be limited to:

(1) Samples necessary to preserve perishable materials considered likely to have been affected by, and contain evidence of, the oil or hazardous substance. These samples generally will be biological materials that are either dead or visibly injured and that evidence suggests have been injured by oil or a hazardous substance;

(2) Samples of other ephemeral conditions or material, such as surface water or soil containing or likely to contain oil or a hazardous substance, where those samples may be necessary for identification and for measurement of concentrations, and where necessary samples may be lost because of factors such as dilution, movement, decomposition, or leaching if not taken immediately; and

(3) Counts of dead or visibly injured organisms, which may not be possible to take if delayed because of factors such as decomposition, scavengers, or water movement. Such counts shall be subject to the provisions of § 11.71(l)(5)(iii) of this part.

#### § 11.23 Preassessment screen—general.

(a) *Requirement.* Before beginning any assessment efforts under this part, except as provided for under the emergency restoration provisions of § 11.21 of this part, the authorized official shall complete a preassessment screen and make a determination as to whether an assessment under this part shall be carried out.

(b) *Purpose.* The purpose of the preassessment screen is to provide a rapid review of readily available information that focuses on resources for which the Federal or State agency may assert trusteeship under section 107(f) of CERCLA. This review should ensure that there is a reasonable probability of making a successful claim before monies and efforts are expended in carrying out an assessment.

(c) *Determination.* When the authorized official has decided to proceed with an assessment under this part, the authorized official shall document the decision in terms of the criteria provided in paragraph (e) of this section in a Preassessment Screen Determination. This Preassessment Screen Determination shall be included in the Report of Assessment described in § 11.90 of this part.

(d) *Content.* The preassessment screen shall be conducted in accordance with the guidance provided in this section and in § 11.24—Preassessment screen—information on the site and

§ 11.25—Preassessment screen—preliminary identification of resources potentially at risk, of this part.

(e) *Criteria.* Based on information gathered pursuant to the preassessment screen and on information gathered pursuant to the NCP, the authorized official shall make a preliminary determination that all of the following criteria are met before proceeding with an assessment:

(1) A discharge of oil or a release of a hazardous substance has occurred;

(2) Natural resources for which the Federal or State agency may assert trusteeship under CERCLA have been or are likely to have been adversely affected by the discharge or release;

(3) The quantity and concentration of the discharged oil or released hazardous substance is sufficient to potentially cause injury, as that term is used in this part, to those natural resources;

(4) Data sufficient to pursue an assessment are readily available or likely to be obtained at reasonable cost; and

(5) Response actions, if any, carried out or planned do not or will not sufficiently remedy the injury to natural resources without further action.

(f) *Coordination.* (1) In a situation where response activity is planned or underway at a particular site, assessment activity shall be coordinated with the lead agency consistent with the NCP, 40 CFR 300.33(b).

(2) Whenever, as part of a response action under the NCP, a preliminary assessment, 40 CFR 300.52 and 300.64, or an OSC Report, 40 CFR 300.40, is to be, or has been, prepared for the site, the authorized official should consult with the lead agency under the NCP, as necessary, and to the extent possible use information or materials gathered for the preliminary assessment or OSC Report, unless doing so would unnecessarily delay the preassessment screen.

(3) Where a preliminary assessment or an OSC Report does not exist or does not contain the information described in this section, that additional information may be gathered.

(4) If the Federal or State agency acting as trustee already has a process similar to the preassessment screen, and the requirements of the preassessment screen can be satisfied by that process, the processes may be combined to avoid duplication.

(g) *Preassessment phase costs.* (1) The following categories of reasonable and necessary costs may be incurred in the preassessment phase of the damage assessment:

(i) Release detection and identification costs;

(ii) Trustee identification and notification costs;

(iii) Potentially injured resource identification costs;

(iv) Initial sampling, data collection, and evaluation costs;

(v) Site characterization and preassessment screen costs; and

(vi) Any other preassessment costs for activities authorized by §§ 11.20 through 11.25 of this part.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred by the authorized official for, and specifically allocable to, site-specific efforts taken during the preassessment phase for assessment of damages to natural resources for which the agency is acting as trustee. Such costs shall be supported by appropriate records and documentation and shall not reflect regular activities performed by the agency in management of the natural resource. Activities undertaken as part of the preassessment phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

#### § 11.24 Preassessment screen—information on the site.

(a) *Information on the site and on the discharge or release.* The authorized official shall obtain and review readily available information concerning:

(1) The time, quantity, duration, and frequency of the discharge or release;

(2) The name of the hazardous substance, as provided for in Table 302.4—List of Hazardous Substances and Reportable Quantities, 40 CFR 302.4;

(3) The history of the current and past use of the site identified as the source of the discharge of oil or release of a hazardous substance;

(4) Relevant operations occurring at or near the site;

(5) Additional oil or hazardous substances potentially discharged or released from the site; and

(6) Potentially responsible parties.

(b) *Damages excluded from liability under CERCLA.* (1) The authorized official shall determine whether the damages:

(i) Resulting from the discharge or release were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement or other comparable environmental analysis, that the decision to grant the permit or license authorizes such commitment of natural resources, and that the facility or project was otherwise operating within the terms of its permit or license; or



(ii) And the release of a hazardous substance from which such damages resulted have occurred wholly before enactment of CERCLA; or

(iii) Resulted from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135-135k; or

(iv) Resulted from any other federally permitted release, as defined in section 101(10) of CERCLA.

(2) An assessment under this part shall not be continued for potential injuries meeting one or more of the criteria described in paragraph (b)(1) of this section, which are exceptions to liability provided in sections 107 (f), (i), and (j) of CERCLA.

**§ 11.25 Preassessment screen—preliminary identification of resources potentially at risk.**

(a) *Preliminary identification of pathways.* (1) The authorized official shall make a preliminary identification of potential exposure pathways to facilitate identification of resources at risk.

(2) Factors to be considered in this determination should include, as appropriate, the circumstances of the discharge or release, the characteristics of the terrain or body of water involved, weather conditions, and the known physical, chemical, and toxicological properties of the oil or hazardous substance.

(3) Pathways to be considered shall include, as appropriate, direct contact, surface water, ground water, air, food chains, and particulate movement.

(b) *Exposed areas.* An estimate of areas where exposure or effects may have occurred or are likely to occur shall be made. This estimate shall identify:

(1) Areas where it has been or can be observed that the oil or hazardous substance has spread;

(2) Areas to which the oil or hazardous substance has likely spread through pathways; and

(3) Areas of indirect effect, where no oil or hazardous substance has spread, but where biological populations may have been affected as a result of animals moving into or through the site.

(c) *Exposed water estimates.* The area of ground water or surface water that may be or has been exposed may be estimated by using the methods described in Appendix I of this part.

(d) *Estimates of concentrations.* An estimate of the concentrations of oil or a hazardous substance in those areas of potential exposure shall be developed.

(e) *Potentially affected resources.* (1) Based upon the estimate of the areas of potential exposure, and the estimate of

concentrations in those areas, the authorized official shall identify natural resources for which he may assert trusteeship that are potentially affected by the discharge or release. This preliminary identification should be used to direct further investigations, but it is not intended to preclude consideration of other resources later found to be affected.

(2) A preliminary estimate, based on information readily available from resource managers, of the services of the resources identified as potentially affected shall be made. This estimate will be used in determining which resources to consider if further assessment efforts are justified.

**Subpart C—Assessment Plan Phase**

**§ 11.30 Assessment Plan—general.**

(a) *Assessment Plan requirement.* Before initiating any assessment methodologies provided in Subpart D for a type A assessment or in Subpart E for a type B assessment, the authorized official shall develop a plan for the assessment of natural resource damages. The Assessment Plan shall be developed in accordance with the requirements and procedures provided in this subpart.

(b) *Purpose.* The purpose of the Assessment Plan is to ensure that the assessment is performed in a planned and systematic manner and that methodologies selected from Subpart D for a type A assessment or from Subpart E for a type B assessment, including the Injury Determination, Quantification, and Damage Determination phases, can be conducted at a reasonable cost, as that phrase is used in this part.

(c) *Assessment Plan phase costs.* (1) The following categories of reasonable and necessary costs may be incurred in the Assessment Plan phase of the damage assessment:

- (i) Methodology identification and screening costs;
- (ii) Potentially responsible party notification costs;
- (iii) Public participation costs;
- (iv) Exposure confirmation analysis costs;

(v) Economic Methodology Determination costs; and

(vi) Any other Assessment Plan costs for activities authorized by §§ 11.30 through 11.35 of this part.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, site-specific efforts taken in the development of an Assessment Plan for a resource for which the agency is acting as trustee.

Such costs shall be supported by appropriate records and documentation, and shall not reflect regular activities performed by the authorized official in management of the natural resource. Activities undertaken as part of the Assessment Plan phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

**§ 11.31 Assessment Plan—content.**

(a) *General content and level of detail.* (1) The Assessment Plan shall identify and document the use of all of the scientific and economic methodologies that are expected to be performed during the Injury Determination, Quantification, and Damage Determination phases of the type B assessment, or the specific type A procedure that will be performed.

(2) The Assessment Plan shall be of sufficient detail to serve as a means of evaluating whether the approach used for assessing the damage is likely to be cost-effective and meets the definition of reasonable costs, as those phrases are used in this part. The Assessment Plan shall include descriptions of the natural resources and the geographical areas involved. In addition, for type B assessments, the Assessment Plan shall include the sampling locations within those geographical areas, sample and survey design, numbers and types of samples to be collected, analyses to be performed, preliminary determination of the recovery period, and other such information required to perform the selected methodologies.

(3) The Assessment Plan shall contain information sufficient to demonstrate that the damage assessment has been coordinated to the extent possible with any remedial investigation feasibility study or other investigation performed pursuant to the NCP.

(4) The Assessment Plan shall contain procedures and schedules for sharing data, split samples, and results of analyses, when requested, with any identified potentially responsible parties and other Federal or State agencies acting as trustees.

(b) *Decision on type A or type B assessment.* The Assessment Plan shall include documentation of the authorized official's decision as to whether to proceed with a type A or a type B assessment. This determination shall be based upon the guidance provided in § 11.33 of this part.

(c) *Specific requirements for type B assessments.* When the Assessment Plan includes type B methodologies, the Plan shall incorporate the following, in addition to the material identified in § 11.31(a) of this part:



(1) The results of the confirmation of exposure performed in accordance with the requirements of § 11.34 of this part;

(2) The Economic Methodology Determination performed in accordance with the guidance provided in § 11.35 of this part;

(3) A Quality Assurance Plan that satisfies the requirements listed in § 300.68(k) of the NCP and applicable EPA guidance for quality control and quality assurance plans; and

(4) The objectives, as required in § 11.64(a)(2) of this part, of any testing and sampling for injury or pathway determination.

#### § 11.32 Assessment Plan—development.

(a) *Pre-development requirements.* The authorized official shall fulfill the following requirements before developing an Assessment Plan.

(1) *Coordination.* (i) If the authorized official's responsibility is shared with other Federal or State agencies acting as trustees as a result of coexisting or contiguous natural resources or concurrent jurisdiction, the authorized official shall ensure that all other known affected Federal and State agencies are notified that an Assessment Plan is being developed. This notification shall include the results of the Preassessment Screen Determination.

(ii) Authorized officials from different agencies are encouraged to cooperate and to coordinate any assessments that involve coexisting or contiguous natural resources or concurrent jurisdiction. They may arrange to divide responsibility for implementing the assessment in any manner that is agreed to by all of the affected Federal and State agencies acting as trustees with the following conditions:

(A) A lead authorized official shall be designated to administer the assessment. The lead authorized official shall act as coordinator and contact regarding all aspects of the assessment and shall act as final arbitrator of disputes if consensus among the authorized officials cannot be reached regarding the development, implementation, or any other aspect of the Assessment Plan. The lead authorized official shall be designated by mutual agreement of all the Federal or State agencies acting as trustees. If consensus cannot be reached as to the designation of the lead authorized official, the lead authorized official shall be designated in accordance with paragraphs (a)(1)(ii) (B), (C), or (D) of this section:

(B) When the natural resources being assessed are located on lands or waters subject to the administrative jurisdiction

of a Federal agency, the Federal agency shall act as the lead authorized official.

(C) For all other natural resources for which the State may assert trusteeship, the State shall act as the lead authorized official.

(D) When there is a natural resource claim against the Fund pursuant to section 111(c)(3) of CERCLA, the lead authorized official will be designated in accordance with the Natural Resource Claims Procedures, 40 CFR 306.20(b).

(iii) If there is a reasonable basis for dividing the assessment, the Federal or State agencies acting as trustees may act independently and pursue separate assessments, actions, or claims so long as the claims do not overlap. In these instances, the agencies shall coordinate their efforts, particularly those concerning the sharing of data and the development of the Assessment Plans.

(2) *Identification and involvement of the potentially responsible party.* (i) If the lead agency under the NCP for response actions at the site has not identified potentially responsible parties, the authorized official shall make reasonable efforts to identify any potentially responsible parties.

(ii) In the event the number of potentially responsible parties is large or if some of the potentially responsible parties cannot be located, the authorized official may proceed against any one or more of the parties identified. The authorized official should use reasonable efforts to proceed against most known potentially responsible parties or at least against all those potentially responsible parties responsible for significant portions of the potential injury.

(iii)(A) The authorized official shall send a Notice of Intent to Perform an Assessment to all identified potentially responsible parties. The Notice shall invite the participation of the potentially responsible party, or, if several parties are involved and if agreed to by the lead authorized official, a representative or representatives designated by the parties, in the development of the type and scope of the assessment and in the performance of the assessment. The Notice shall briefly describe, to the extent known, the site, vessel, or facility involved, the discharge of oil or release of hazardous substance of concern to the authorized official, and the resources potentially at risk.

(B) The authorized official shall allow at least 30 calendar days, with reasonable extensions granted as appropriate, for the potentially responsible party or parties notified to respond to the Notice before proceeding with the development of the Assessment Plan or any other assessment actions.

(b) *Plan approval.* The authorized official shall have final approval as to the appropriate methodologies to include in the Assessment Plan and any modifications to the Assessment Plan.

(c) *Public involvement in the Assessment Plan.* (1) The Assessment Plan shall be made available for review by any identified potentially responsible parties, other Federal or State agencies acting as trustees, other affected Federal or State agencies, and any other interested members of the public for a period of at least 30 calendar days, with reasonable extensions granted as appropriate, before the performance of any methodologies contained therein.

(2) Any comments concerning the Assessment Plan received from identified potentially responsible parties, other Federal or State agencies acting as trustees, other affected Federal or State agencies, and any other interested members of the public, together with responses to those comments, shall be included as part of the Report of Assessment, described in § 11.90 of this part.

(d) *Plan implementation.* At the option of the authorized official and if agreed to by any potentially responsible party, or parties acting jointly, the potentially responsible party or any other party under the direction, guidance, and monitoring of the authorized official may implement all or any part of the Assessment Plan finally approved by the authorized official. Any decision by the authorized official to allow or not allow implementation by the potentially responsible party shall be documented in the Assessment Plan.

(e) *Plan modification.* (1) The Assessment Plan may be modified at any stage of the assessment as new information becomes available.

(2)(i) Any modification to the Assessment Plan that in the judgment of the authorized official is significant shall be made available for review by any identified potentially responsible party, any other affected Federal or State agencies acting as trustees, and any other interested members of the public for a period of at least 30 calendar days, with reasonable extensions granted as appropriate, before tasks called for in the modified plan are begun.

(ii) Any modification to the Assessment Plan that in the judgment of the authorized official is not significant shall be made available for review by any identified potentially responsible party, any other affected Federal or State agencies acting as trustees, and any other interested members of the public, but the implementation of such



modification need not be delayed as a result of such review.

(f) *Plan review.* (1) After the Injury Determination phase is completed and before the Quantification phase is begun, the authorized official shall review the decisions incorporated in the Assessment Plan.

(2) The purpose of this review is to provide an opportunity to confirm the decisions made in the Economic Methodology Determination, or to make such determination if the determination was not completed in the plan development stage, and to ensure that the selection of methodologies for the Quantification and Damage Determination phases is consistent with the results of the Injury Determination phase.

(3) Any revision or determination of the Economic Methodology Determination shall be deemed significant for the purposes of § 11.32(e)(2)(i) of this part.

#### § 11.33 Assessment Plan—deciding between a type A or type B assessment. [Reserved]

#### § 11.34 Assessment Plan—confirmation of exposure.

(a) *Requirement.* (1) In accordance with the requirements provided in this section, the authorized official shall confirm that at least one of the natural resources identified as potentially injured in the preassessment screen has in fact been exposed to the oil or hazardous substance.

(2) Type B assessment methodologies shall be included in the Assessment Plan only upon meeting the requirements of this section.

(b) *Procedures.* (1) Whenever possible, exposure shall be confirmed by using existing data, such as those collected for response actions by the OSC, or other available studies or surveys of the assessment area.

(2) Where sampling has been done before the completion of the preassessment screen, chemical analyses of such samples may be performed to confirm that exposure has occurred. Such analyses shall be limited to the number and type required for confirmation of exposure.

(3) Where existing data are unavailable or insufficient to confirm exposure, one or more of the analytical methodologies provided in the Injury Determination phase may be used. The collection and analysis of new data shall be limited to that necessary to confirm exposure and shall not include testing for baseline levels or for injury, as those phrases are used in this part.

#### § 11.35 Assessment Plan—Economic Methodology Determination.

(a) *Requirements.* Based upon the guidance provided in this section, the authorized official shall determine whether: restoration or replacement costs; or a diminution of use values will form the basis of the measure of damages. This determination, referred to as the Economic Methodology Determination, shall be used in developing the Assessment Plan for a type B assessment.

(b) *Determination.* (1) The Economic Methodology Determination shall be used to ascertain whether: restoration or replacement costs; or a diminution of use values will form the basis of further economic analysis in the Damage Determination phase.

(2) The authorized official shall select the lesser of: restoration or replacement costs; or diminution of use values as the measure of damages, except as specified in paragraph (b)(3) of this section.

(3) When restoration or replacement of the injured resource is not technically feasible, as that phrase is used in this part, the diminution in use values, as determined by using the methodologies listed in § 11.83 of this part, or other methodologies that meet the acceptance criterion in § 11.83 of this part, shall constitute the measure of damages.

(c) *Costs and benefits.* (1) The Economic Methodology Determination shall estimate and document the costs of restoration or replacement and the benefits gained by restoration or replacement of the resource or the resource services.

(2) The costs of restoration or replacement, as determined in paragraph (d) of this section, shall be measured by the anticipated management actions and resource acquisitions required to return the resource services lost as a result of the injury. In determining the costs of restoration or replacement, the costs of acquiring land for Federal management should be used only if this acquisition would represent the sole viable method of obtaining the lost services.

(3) The benefits of restoration or replacement, as determined in paragraph (d) of this section, shall be the value of the restored uses associated with the anticipated management actions and resource acquisitions as determined in paragraph (c)(2) of this section.

(d) *Content.* (1) In performing the Economic Methodology Determination, existing data and studies should be relied upon. Significant new data collection or modeling efforts should not be performed at this stage of the

assessment process to complete this determination.

(2) If existing data are insufficient to perform the Economic Methodology Determination, this analysis may be postponed until the Assessment Plan review stage at the completion of the Injury Determination phase of the assessment.

(3) Each Economic Methodology Determination should estimate the following benefits and costs:

(i) The expected present value, if possible, of anticipated restoration or replacement costs, expressed in constant dollars, and separated into capital, operating, and maintenance costs, and including the timing of the costs;

(ii) The expected present value, if possible, of anticipated use values gained through restoration or replacement, expressed in constant dollars, specified for the same base year as the cost estimate, and separated into recurring or nonrecurring benefits, including the timing of the benefit.

(4) Any estimates of costs and benefits shall make explicit all assumptions pertaining to costs and benefits and shall specify all sources of information. Any effects that cannot be expressed in monetary terms should be listed.

(5) The discount rate to be used in developing estimates of the expected present value of benefits and costs shall be that determined in accordance with the guidance in § 11.84(e) of this part.

#### Subpart D—Type A Assessments [Reserved]

#### Subpart E—Type B Assessments

##### § 11.60 Type B assessments—general.

(a) *Purpose.* The purpose of the type B assessment is to provide alternative methodologies for conducting natural resource damage assessments in individual cases.

(b) *Steps in the type B assessment.* The type B assessment consists of three phases: § 11.61—Injury Determination; § 11.70—Quantification; and § 11.80—Damage Determination, of this part.

(c) *Completion of type B assessment.* After completion of the type B assessment, a Report of Assessment, as described in § 11.90 of this part, shall be prepared. The Report of Assessment shall include the determinations made in each phase.

(d) *Type B assessment costs.* (1) The following categories of reasonable and necessary costs may be incurred in the assessment phase of the damage assessment:



(i) Sampling, testing, and evaluation costs for injury and pathway determination;

(ii) Quantification costs (including baseline service determination and resource recoverability analysis);

(iii) Restoration Methodology Plan development costs including:

(A) Development of alternatives;

(B) Evaluation of alternatives;

(C) Potentially responsible party, agency, and public reviews;

(D) Other such costs for activities authorized by § 11.82 of this part;

(iv) Use value methodology calculation costs, and

(v) Any other assessment costs authorized by §§ 11.60–11.84 of this part.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, site specific efforts taken in the assessment of damages for a natural resource for which the agency is acting as trustee. Such costs shall be supported by appropriate records and documentation, and shall not reflect regular activities performed by the agency in management of the natural resource. Activities undertaken as part of the damage assessment phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

#### § 11.61 Injury Determination phase—general.

(a) *Requirement.* (1) The authorized official shall, in accordance with the procedures provided in the Injury Determination phase of this part, determine: whether an injury to one or more of the natural resources has occurred; and that the injury resulted from the discharge of oil or release of a hazardous substance based upon the exposure pathway and the nature of the injury.

(2) The Injury Determination phase consists of § 11.61—general; § 11.62—*injury definition*; § 11.63—*pathway determination*; and § 11.64—*testing and sampling methods*, of this part.

(b) *Purpose.* The purpose of the Injury Determination phase is to ensure that only assessments involving well documented injuries resulting from the discharge of oil or release of a hazardous substance proceed through the type B assessment.

(c) *Injury Determination phase steps.*

(1) The authorized official shall determine whether the potentially injured resource constitutes a surface water, ground water, air, geologic, or biological resource as defined in § 11.14 of this part. The authorized official shall then proceed in accordance with the

guidance provided in the injury definition section, § 11.62 of this part, to determine if the resource is injured.

(2) The authorized official shall follow the guidance provided in the testing and sampling methods section, § 11.64 of this part, in selecting the methodology for determining injury. The authorized official shall select from available testing and sampling procedures one or more procedures that meet the requirements of the selected methodologies.

(3) The authorized official shall follow the guidance provided in the pathway section, § 11.63 of this part, to determine the route through which the oil or hazardous substance is or was transported from the source of the discharge or release to the injured resource.

(4) If more than one resource, as defined in § 11.14(z) of this part, has potentially been injured, an injury determination for each resource shall be made in accordance with the guidance provided in each section of the Injury Determination phase.

(d) *Selection of methodologies.* (1) One of the methodologies provided in § 11.64 of this part for the potentially injured resource, or one that meets the acceptance criteria provided for that resource, shall be used to establish injury.

(2) Selection of the methodologies for the Injury Determination phase shall be based upon cost-effectiveness as that phrase is used in this part.

(e) *Completion of Injury Determination phase.* (1) Upon completion of the Injury Determination phase, the Assessment Plan shall be reviewed in accordance with the requirements of § 11.32(f) of this part.

(2) When the authorized official has determined that one or more of the natural resources has been injured as a result of the discharge or release, the authorized official may proceed to the Quantification and the Damage Determination phases.

(3) When the authorized official has determined that an injury has not occurred to at least one of the natural resources or that an injury has occurred but that the injury cannot be linked to the discharge or release, the authorized official shall not pursue further assessment under this part.

#### § 11.62 Injury Determination phase—*injury definition.*

(a) The authorized official shall determine that an injury has occurred to natural resources based upon the definitions provided in this section for surface water, ground water, air, geologic, and biological resources. The

authorized official shall test for injury using the methodologies and guidance provided in § 11.64 of this part. The test results of the methodologies must meet the acceptance criteria provided in this section to make a determination of injury.

(b) *Surface water resources.* (1) An injury to a surface water resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(i) Concentrations and duration of substances in excess of drinking water standards as established by sections 1411–1416 of SDWA, or by other Federal or State laws or regulations that establish such standards for drinking water, in surface water that was potable before the discharge or release;

(ii) Concentrations and duration of substances in excess of water quality criteria established by section 1401(1)(D) of SDWA, or by other Federal or State laws or regulations that establish such criteria for public water supplies, in surface water that before the discharge or release met the criteria and is a committed use, as the phrase is used in this part, as a public water supply;

(iii) Concentrations and duration of substances in excess of applicable water quality criteria established by section 304(a)(1) of the CWA, or by other Federal or State laws or regulations that establish such criteria, in surface water that before the discharge or release met the criteria and is a committed use, as that phrase is used in this part, as a habitat for aquatic life, water supply, or recreation. The most stringent criterion shall apply when surface water is used for more than one of these purposes;

(iv) Concentrations of substances on bed, bank, or shoreline sediments sufficient to cause the sediment to exhibit characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act, 42 U.S.C. 6921; or

(v) Concentrations and duration of substances sufficient to have caused injury as defined in paragraphs (c), (d), (e), or (f) of this section to ground water, air, geologic, or biological resources, when exposed to surface water, suspended sediments, or bed, bank, or shoreline sediments.

(2)(i) The acceptance criterion for injury to the surface water resource is the measurement of concentrations of oil or a hazardous substance in two samples from the resource. The samples must be one of the following types,



except as specified in § 11.62 (b)(3) of this part:

(A) Two water samples from different locations, separated by a straight-line distance of not less than 100 feet; or

(B) Two bed, bank, or shoreline sediment samples from different locations separated by a straight-line distance of not less than 100 feet; or

(C) One water sample and one bed, bank, or shoreline sediment sample; or

(D) Two water samples from the same location collected at different times.

(ii) In those instances when injury is determined and no oil or hazardous substances are detected in samples from the surface water resource, it must be demonstrated that the substance causing injury occurs or has occurred in the surface water resource as a result of physical, chemical, or biological reactions initiated by the discharge of oil or release of a hazardous substance.

(3) If the maximum straight-line distance of the surface water resource is less than 100 feet, then the samples required in § 11.62(b)(2)(i) (A) and (B) of this part should be separated by one-half the maximum straight-line distance of the surface water resource.

(c) *Ground water resources.* (1) An injury to the ground water resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(i) Concentrations of substances in excess of drinking water standards, established by sections 1411-1416 of the SDWA, or by other Federal or State laws or regulations that establish such standards for drinking water, in ground water that was potable before the discharge or release;

(ii) Concentrations of substances in excess of water quality criteria, established by section 1401(1)(d) of the SDWA, or by other Federal or State laws or regulations that establish such criteria for public water supplies, in ground water that before the discharge or release met the criteria and is a committed use, as the phrase is used in this part, as a public water supply;

(iii) Concentrations of substances in excess of applicable water quality criteria, established by section 304(a)(1) of the CWA, or by other Federal or State laws or regulations that establish such criteria for domestic water supplies, in ground water that before the discharge or release met the criteria and is a committed use as that phrase is used in this part, as a domestic water supply; or

(iv) Concentrations of substances sufficient to have caused injury as defined in paragraphs (b), (d), (e), or (f) of this section to surface water, air,

geologic, or biological resources, when exposed to ground water.

(2) The acceptance criterion for injury to ground water resources is the measurement of concentrations of oil or hazardous substance in two ground water samples. The water samples must be from the same geohydrologic unit and must be obtained from one of the following pairs of sources, except as specified in § 11.62(c)(3) of this part:

(i) Two properly constructed wells separated by a straight-line distance of not less than 100 feet; or

(ii) A properly constructed well and a natural spring or seep separated by a straight-line distance of not less than 100 feet; or

(iii) Two natural springs or seeps separated by a straight-line distance of not less than 100 feet.

(3) If the maximum straight-line distance of the ground water resource is less than 100 feet, the samples required in § 11.62(c)(2) of this part should be separated by one-half of the maximum straight-line distance of the ground water resource.

(4) In those instances when injury is determined and no oil or hazardous substance is detected in samples from the ground water resource, it must be demonstrated that the substance causing injury occurs or has occurred in the ground water resource as a result of physical, chemical, or biological reactions initiated by the discharge of oil or release of hazardous substances.

(d) *Air resources.* An injury to the air resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(1) Concentrations of emissions in excess of standards for hazardous air pollutants established by section 112 of the Clean Air Act, 42 U.S.C. 7412, or by other Federal or State air standards established for the protection of public welfare or natural resources; or

(2) Concentrations and duration of emissions sufficient to have caused injury as defined in paragraphs (b), (c), (e), or (f) of this section to surface water, ground water, geologic, or biological resources when exposed to the emissions.

(e) *Geologic resources.* An injury to the geologic resource has resulted from the discharge of oil or release of a hazardous substance if one or more of the following changes in the physical or chemical quality of the resource is measured:

(1) Concentrations of substances sufficient for the materials in the geologic resource to exhibit

characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act, 42 U.S.C. 6921;

(2) Concentrations of substances sufficient to raise the negative logarithm of the hydrogen ion concentration of the soil (pH) to above 8.5 (above 7.5 in humid areas) or to reduce it below 4.0;

(3) Concentrations of substances sufficient to yield a salt saturation value greater than 2 millimhos per centimeter in the soil or a sodium adsorption ratio of more than 0.176;

(4) Concentrations of substances sufficient to decrease the water holding capacity such that plant, microbial, or invertebrate populations are affected;

(5) Concentrations of substances sufficient to impede soil microbial respiration to an extent that plant and microbial growth have been inhibited;

(6) Concentrations in the soil of substances sufficient to inhibit carbon mineralization resulting from a reduction in soil microbial populations;

(7) Concentrations of substances sufficient to restrict the ability to access, develop, or use mineral resources within or beneath the geologic resource exposed to the oil or hazardous substance;

(8) Concentrations of substances sufficient to have caused injury to ground water, as defined in paragraph (c) of this section, from physical or chemical changes in gases or water from the unsaturated zone;

(9) Concentrations in the soil of substances sufficient to cause a toxic response to soil invertebrates;

(10) Concentrations in the soil of substances sufficient to cause a phytotoxic response such as retardation of plant growth; or

(11) Concentrations of substances sufficient to have caused injury as defined in paragraphs (b), (c), (d), or (f), of this section to surface water, ground water, air, or biological resources when exposed to the substances.

(f) *Biological resources.* (1) An injury to a biological resource has resulted from the discharge of oil or release of a hazardous substance if concentration of the substance is sufficient to:

(i) Cause the biological resource or its offspring to have undergone at least one of the following adverse changes in viability: death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), or physical deformations; or

(ii) Exceed action or tolerance levels established under section 402 of the Food, Drug and Cosmetic Act, 21 U.S.C. 342, in edible portions of organisms; or



(iii) Exceed levels for which an appropriate State health agency has issued directives to limit or ban consumption of such organism.

(2) The method for determining injury to a biological resource, as defined in paragraph (f)(1)(i) of this section, shall be chosen based upon the capability of the method to demonstrate a measurable biological response. An injury can be demonstrated if the authorized official determines that the biological response under consideration can satisfy all of the following acceptance criteria:

(i) The biological response is often the result of exposure to oil or hazardous substances. This criterion excludes biological responses that are caused predominately by other environmental factors such as disturbance, nutrition, trauma, or weather. The biological response must be a commonly documented response resulting from exposure to oil or hazardous substances.

(ii) Exposure to oil or hazardous substances is known to cause this biological response in free-ranging organisms. This criterion identifies biological responses that have been documented to occur in a natural ecosystem as a result of exposure to oil or hazardous substances. The documentation must include the correlation of the degree of the biological response to the observed exposure concentration of oil or hazardous substances.

(iii) Exposure to oil or hazardous substances is known to cause this biological response in controlled experiments. This criterion provides a quantitative confirmation of a biological response occurring under environmentally realistic exposure levels that may be linked to oil or hazardous substance exposure that has been observed in a natural ecosystem. Biological responses that have been documented only in controlled experimental conditions are insufficient to establish correlation with exposure occurring in a natural ecosystem.

(iv) The biological response measurement is practical to perform and produces scientifically valid results. The biological response measurement must be sufficiently routine such that it is practical to perform the biological response measurement and to obtain scientifically valid results. To meet this criterion, the biological response measurement must be adequately documented in scientific literature, must produce reproducible and verifiable results, and must have well defined and accepted statistical criteria for interpreting as well as rejecting results.

(3) Unless otherwise provided for in this section, the injury determination must be based upon the establishment of a statistically significant difference in the biological response between samples from populations in the assessment area and in the control area. The determination as to what constitutes a statistically significant difference must be consistent with the quality assurance provisions of the Assessment Plan. The selection of the control area shall be consistent with the guidance provided in § 11.72 of this part.

(4) The biological responses listed in this paragraph have been evaluated and found to satisfy the acceptance criteria provided in (f)(2) of this section. The authorized official may, when appropriate, select from this list to determine injury to fish and wildlife resources or may designate another response as the determiner of injury provided that the designated response can satisfy the acceptance criteria provided in (f)(2) of this section. The biological responses are listed by the categories of injury for which they may be applied.

(i) *Category of injury—death.* Five biological responses for determining when death is a result of exposure to the discharge of oil or release of a hazardous substance have met the acceptance criteria.

(A) *Brain cholinesterase (ChE) enzyme activity.* Injury has occurred when brain ChE activity in a sample from the population has been inhibited by at least 50 percent compared to the mean for normal brain ChE activity of the wildlife species. These enzymes are in the nervous system of vertebrate organisms and the rate of ChE activity is associated with the regulation of nerve impulse transmission. This biological response may be used to confirm injury when anti-ChE substances, such as organophosphorus and carbamate pesticides, are suspected to have resulted in death to bird and mammal species.

(B) *Fish kill investigations.* Injury has occurred when a significant increase in the frequency or numbers of dead or dying fish can be measured in accordance with the procedures for counting dead or dying fish contained in Part II (Fish-Kill Counting Guidelines) of "Monetary Values of Freshwater Fish and Fish-Kill Counting Guidelines," American Fisheries Society Special Publication Number 13, 1982 (incorporated by reference, see § 11.18).

(C) *Wildlife kill investigations.* Injury has occurred when a significant increase in the frequency or number of dead or dying birds or mammal species can be measured in a population sample from

the assessment area as compared to a population sample from a control area. Wildlife kill investigations may be used when acute mortality has occurred to multiple wildlife species, or when detectable quantities of oil or hazardous substances have adhered to, bound to, or otherwise covered surface tissue, or had been ingested or inhaled by dead or dying bird or mammal species.

(D) *In situ bioassay.* Injury has occurred when a statistically significant difference can be measured in the total mortality and/or mortality rates between population samples exposed in situ to a discharge of oil or a release of hazardous substance and those in a control site. In situ caged or confined bioassay may be used to confirm injury when oil or hazardous substances are suspected to have caused death to fish species.

(E) *Laboratory toxicity testing.* Injury has occurred when a statistically significant difference can be measured in the total mortality and/or mortality rates between population samples of the test organisms placed in exposure chambers containing concentrations of oil or hazardous substances and those in a control chamber. Published standardized laboratory fish toxicity testing methodologies for acute flow-through, acute static, partial-chronic (early life stage), and chronic (life cycle) toxicity tests may be used to confirm injury. The oil or hazardous substance used in the test must be the exact substance or a substance that is reasonably comparable to that suspected to have caused death to the natural population of fish.

(ii) *Category of injury—disease.* One biological response for determining when disease is a result of exposure to the discharge of oil or release of a hazardous substance has met the acceptance criteria.

(A) *Fin erosion.* Injury has occurred when a statistically significant difference can be measured in the frequency of occurrence of fin erosion (also referred to as fin rot) in a population sample from the assessment area as compared to a sample from the control area. Fin erosion shall be confirmed by appropriate histological procedures. Fin erosion may be used when oil or hazardous substances are suspected to have caused the disease.

(iii) *Category of injury—behavioral abnormalities.* Two biological responses for determining when behavioral abnormalities are a result of the exposure to the discharge of oil or release of a hazardous substance have met the acceptance criteria.



(A) *Clinical behavioral signs of toxicity.* Injury has occurred when a statistically significant difference can be measured in the frequency of occurrence of clinical behavioral signs of toxicity in a population sample from the assessment area as compared to a sample from the control area. Clinical behavioral signs of toxicity are characteristic behavioral symptoms expressed by an organism in response to exposure to an oil or hazardous substance. The clinical behavioral signs of toxicity used shall be those that have been documented in published literature.

(B) *Avoidance.* Injury has occurred when a statistically significant difference can be measured in the frequency of avoidance behavior in population samples of fish placed in testing chambers with equal access to water containing oil or a hazardous substance and the control water. The oil or hazardous substance used in the test must be the exact substance or a substance that is reasonably comparable to that suspected to have caused avoidance to the natural populations of fish. This biological response may be used to confirm injury when oil or hazardous substances are suspected to have resulted in avoidance behavior in fish species.

(iv) *Category of injury—cancer.* One biological response for determining when cancer is a result of exposure to the discharge of oil or release of a hazardous substance has met the acceptance criteria.

(A) *Fish neoplasm.* Injury has occurred when a statistically significant difference can be measured in the frequency of occurrence of the fish neoplasia when comparing population samples from the assessment area and a control area. Neoplasms are characterized by relatively autonomous growth of abnormal cells that by proliferation infiltrate, press upon, or invade healthy tissue thereby causing destruction of cells, interference with physiological functions, or death of the organism. The following type of fish neoplasia may be used to determine injury: liver neoplasia and skin neoplasia. The neoplasms shall be confirmed by histological procedures and such confirmation procedures may also include special staining techniques for specific tissue components, ultra-structural examination using electron microscopy to identify cell origin, and to rule out or confirm viral, protozoan, or other causal agents. Fish neoplasm may be used to determine injury when oil or hazardous substances are suspected to have been the causal agent.

(v) *Category of injury—physiological malfunctions.* Five biological responses for determining when physiological malfunctions are a result of exposure to the discharge of oil or release of a hazardous substance have met the acceptance criteria.

(A) *Eggshell thinning.* Injury has occurred when eggshell thicknesses for samples for a population of a given species at the assessment area are thinner than those for samples from a population at a control area, or are at least 15 percent thinner than eggshells collected before 1946 from the same geographic area and stored in a museum. This biological response is a measure of avian eggshell thickness resulting from the adult bird having assimilated the oil or hazardous substance. This biological response may be used when the organochlorine pesticide DDT or its metabolites are suspected to have caused such physiological malfunction injury.

(B) *Reduced avian reproduction.* Injury has occurred when a statistically significant difference can be measured in the mean number of young fledged per active nest when comparing samples from populations in the assessment area and a control area. The fledging success (the number of healthy young leaving the nest) shall be used as the measurement of injury. Factors that may contribute to this measurement include egg fertility, hatching success, and survival of young. This biological response may be used when oil or hazardous substances are suspected to have reduced the nesting success of avian species.

(C) *Cholinesterase (ChE) enzyme inhibition.* Injury has occurred when brain ChE activity in a sample from the population at the assessment area shows a statistically significant inhibition when compared to the mean activity level in samples from populations in a control area. These enzymes are in the nervous systems of vertebrate organisms and the rate of ChE activity is associated with the regulation of nerve impulse transmission. This biological response may be used as a demonstration of physiological malfunction injury to birds, mammals, and reptiles when anti-ChE substances, such as organophosphorus and carbamate pesticides, have been discharged or released.

(D) *Delta-aminolevulinic acid dehydratase (ALAD) inhibition.* Injury has occurred when the activity level of whole blood ALAD in a sample from the population of a given species at an assessment area is significantly less

than mean values for a population at a control area, and ALAD depression of at least 50 percent can be measured. The ALAD enzyme is associated with the formation of hemoglobin in blood and in chemical detoxification processes in the liver. This biological response is a measure of the rate of ALAD activity. This biological response may be used to determine injury to bird and mammal species that have been exposed to lead.

(E) *Reduced fish reproduction.* Injury has occurred when a statistically significant difference in reproduction success between the control organisms and the test organisms can be measured based on the use of published standardized laboratory toxicity testing methodologies. This biological response may be used when the oil or hazardous substance is suspected to have caused a reduction in the reproductive success of fish species. Laboratory partial-chronic and laboratory chronic toxicity tests may be used. The oil or hazardous substance used in the test must be the exact substance or a substance that is reasonably comparable to that suspected to have caused reduced reproductive success in the natural population of fish.

(vi) *Category of injury—physical deformation.* Four biological responses for determining when physical deformations are a result of exposure to the discharge of oil or release of a hazardous substance have met the injury acceptance criteria.

(A) *Overt external malformations.* Injury has occurred when a statistically significant difference can be measured in the frequency of overt external malformation, such as small or missing eyes, when comparing samples from populations of wildlife species from the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

(B) *Skeletal deformities.* Injury has occurred when a statistically significant difference can be measured in the frequency of skeletal deformities, such as defects in growth of bones, when comparing samples from populations of wildlife species from the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

(C) *Internal whole organ and soft tissue malformation.* Injury has occurred when a statistically significant difference can be measured in the frequency of



malformations to brain, heart, liver, kidney, and other organs, as well as soft tissues of the gastrointestinal tract and vascular system, when comparing samples from populations of wildlife species in the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

(D) *Histopathological lesions.* Injury has occurred when a statistically significant difference can be measured in the frequency of tissue or cellular lesions when comparing samples from populations of wildlife species from the assessment area and a control area. This biological response may be used as a demonstration of injury when such physical deformations are observed in wildlife species exposed to oil or hazardous substances.

**§ 11.63 Injury Determination phase—pathway determination.**

(a) *General.* (1) To determine the exposure pathways of the oil or hazardous substance, the following shall be considered:

(i) The chemical and physical characteristics of the discharged oil or released hazardous substance when transported by natural processes or while present in natural media;

(ii) The rate or mechanism of transport by natural processes of the discharged oil or released hazardous substance; and

(iii) Combinations of pathways that, when viewed together, may transport the discharged oil or released hazardous substance to the resource.

(2) The pathway may be determined by either demonstrating the presence of the oil or hazardous substance in sufficient concentrations in the pathway resource or by using a model that demonstrates that the conditions existed in the route and in the oil or hazardous substance such that the route served as the pathway.

(3) To the extent that the information needed to make this determination is not available, tests shall be conducted and necessary data shall be collected to meet the requirements of this section. Methods that may be used to conduct these additional tests and collect new information are described in § 11.64 of this part.

(b) *Surface water pathway.* (1) When the surface water resource is suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether the surface water resource, either solely or in combination with other media, served as

the exposure pathway for injury to the resource.

(2) (i) Using available information and such additional tests as necessary, it should be determined whether the surface water resource downstream or downcurrent of the source of discharge or release has been exposed to the oil or hazardous substance.

(ii) When the source of discharge or release is on an open water body, such as a marsh, pond, lake, reservoir, bay, estuary, gulf, or sound, it should be determined, using available information and such additional tests as necessary, whether the surface water resource in the vicinity of the source of discharge or release has been exposed to the oil or hazardous substance.

(3) (i) If a surface water resource is or likely has been exposed, the areal extent of the exposed surface water resource should be estimated, including delineation of:

(A) Channels and reaches;

(B) Seasonal boundaries of open water bodies; and

(C) Depth of exposed bed, bank, or shoreline sediments.

(ii) As appropriate to the exposed resource, the following should be determined:

(A) Hydraulic parameters and streamflow characteristics of channels and reaches;

(B) Bed sediment and suspended sediment characteristics, including grain size, grain mineralogy, and chemistry of grain surfaces;

(C) Volume, inflow-outflow rates, degree of stratification, bathymetry, and bottom sediment characteristics of surface water bodies;

(D) Suspended sediment concentrations and loads and bed forms and loads of streams and tidally affected waters; and

(E) Tidal flux, current direction, and current rate in coastal and marine waters.

(4) (i) Using available information and data from additional tests as necessary, the mobility of the oil or hazardous substance in the exposed surface water resource should be estimated. This estimate should consider such physical and chemical characteristics of the oil or hazardous substance as aqueous solubility, aqueous miscibility, density, volatility, potential for chemical degradation, chemical precipitation, biological degradation, biological uptake, and adsorption.

(ii) Previous studies of the characteristics discussed in paragraph (b)(4)(i) of this section should be relied upon if hydraulic, physical, and chemical conditions in the exposed surface water resource are similar to

experimental conditions of the previous studies. In the absence of this information, those field and laboratory studies necessary to estimate the mobility of the oil or hazardous substance in surface water flow may be performed.

(5) (i) The rate of transport of the oil or hazardous substance in surface water should be estimated using available information and with consideration of the hydraulic properties of the exposed resource and the physical and chemical characteristics of the oil or hazardous substance.

(ii) Transport rates may be estimated using:

(A) The results of previous time-of-travel and dispersion studies made in the exposed surface water resource before the discharge or release;

(B) The results of previous studies, conducted with the same or similar chemical substances to those discharged or released under experimental conditions similar to the hydraulic, chemical, and biological conditions in the exposed surface water resource;

(C) The results of field measurements of time-of-travel and dispersion made in the exposed or comparable surface water resource, using natural or artificial substances with transport characteristics that reasonably approximate those of the oil or hazardous substance; and

(D) The results of simulation studies using the results of appropriate time-of-travel and dispersion studies in the exposed or comparable surface water resource.

(c) *Ground water pathway.* (1) When ground water resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether ground water resources, either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2) Using available information and such additional tests as necessary, it should be determined whether the unsaturated zone, the ground water, or the geologic materials beneath or downgradient of the source of discharge or release have been exposed to the oil or hazardous substance.

(3) If a ground water resource is or likely has been exposed, available information and such additional tests should be used as necessary to determine the characteristics of the unsaturated zone, as well as any aquifers and confining units containing the exposed ground water, in the vicinity of the source of discharge or



release. The characteristics of concern include:

- (i) Local geographical extent of aquifers and confining units;
  - (ii) Seasonal depth to saturated zone beneath the site;
  - (iii) Direction of ground water flow in aquifers;
  - (iv) Local variation in direction of ground water flow resulting from seasonal or pumpage effects;
  - (v) Elevation of top and bottom of aquifer and confining units;
  - (vi) Lithology, mineralogy, and porosity of rocks or sediments comprising the unsaturated zone, aquifers, and confining units;
  - (vii) Transmissivity and hydraulic conductivity of aquifers and confining units; and
  - (viii) Nature and amount of hydraulic connection between ground water and local surface water resources.
- (4) (i) Using available information and such additional tests as necessary, the mobility of the oil or hazardous substance within the unsaturated zone and in the exposed ground water resources should be estimated. This estimate should consider local recharge rates and such physical and chemical characteristics of the oil or hazardous substance as aqueous solubility, aqueous miscibility, density, volatility, potential for chemical degradation, chemical precipitation, biological degradation, biological uptake, and adsorption onto solid phases in the unsaturated zone, aquifers, and confining units.
- (ii) Previous studies of the characteristics discussed in paragraph (c)(4)(i) of this section should be relied upon if geohydrologic, physical, and chemical conditions in the exposed ground water resource are similar to experimental conditions of the previous studies. In the absence of this information, field and laboratory studies may be performed as necessary to estimate the mobility of the oil or hazardous substance within the unsaturated zone and in ground water flows.
- (5) (i) The rate of transport of the oil or hazardous substance in ground water should be estimated using available information and with consideration of the site hydrology, geohydrologic properties of the exposed resource, and the physical and chemical characteristics of the oil or hazardous substance.
- (ii) Transport rates may be estimated using:
- (A) Results of previous studies conducted with the same or similar chemical substance, under experimental geohydrologic, physical, and chemical

conditions similar to the ground water resource exposed to the oil or hazardous substance;

(B) Results of field measurements that allow computation of arrival times of the discharged or released substance at downgradient wells, so that an empirical transport rate may be derived; or

(C) Results of simulation studies, including analog or numerical modeling of the ground water system.

(d) *Air pathway.* (1) When air resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether the air resources either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2) Using available information, air modeling, and additional field sampling and analysis, it should be determined whether air resources have been exposed to the discharge of oil or release of a hazardous substance.

(3) (i) If an air resource is or has likely been exposed, available information and such additional tests as necessary should be used to estimate the areal extent of exposure and the duration and frequency of exposure of such areas to emissions from the discharge of oil or release of a hazardous substance.

(ii) The areal extent of exposure is defined as the geographical surface area or space where emissions from the source of discharge or release are found or otherwise determined to be present for such duration and frequency as to potentially result in injury to resources present within the area or space.

(4) Previous studies of the characteristics discussed in paragraph (d)(3)(i) of this section should be relied upon if the conditions in the exposed air resource are similar to experimental conditions of the previous studies. In the absence of this information, air sampling and analysis methods identified in § 11.64(d) of this part, air modeling methods, or a combination of these methods may be used in identifying the air exposure pathway and in estimating the areal extent of exposure and duration and frequency of exposure.

(5) For estimating the areal extent, duration, and frequency of exposure from the discharge or release, the following factors shall be considered as may be appropriate for each emissions event:

(i) The manner and nature in which the discharge or release occurs, including the duration of the emissions, amount of the discharge or release, and emergency or other time critical factors;

(ii) The configuration of the emitting source, including sources such as ponds,

lagoons, pools, puddles, land and water surface spills, and venting from containers and vessels;

(iii) Physical and chemical properties of substances discharged or released, including volatility, toxicity, solubility, and physical state;

(iv) The deposition from the air and re-emission to the air of gaseous and particulate emissions that provide periodic transport of the emissions; and

(v) Air transport and dispersion factors, including wind speed and direction, and atmospheric stability and temperature.

(e) *Geologic pathway.* (1) When geologic resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using guidance provided in this paragraph, whether geologic resources, either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2) (i) Using available information and the methods listed in § 11.64(e) of this part, it should be determined whether any element of the geologic resource has been exposed to the oil or hazardous substance. If a geologic resource is or has likely been exposed, the areal extent of the exposed geologic resource, including the lateral and vertical extent of the dispersion, should be estimated.

(ii) To determine whether the unsaturated zone served as a pathway, the guidance provided in paragraph (c) of this section should be followed.

(f) *Biological pathway.* (1) When biological resources are suspected as the pathway or a component of the pathway, the authorized official shall determine, using the guidance provided in this paragraph, whether biological resources, either solely or in combination with other media, served as the exposure pathway for injury to the resource.

(2) Biological pathways that resulted from either direct or indirect exposure to the oil or hazardous substance, or from exposure to products of chemical or biological reactions initiated by the discharge or release shall be identified. Direct exposure can result from direct physical contact with the discharged oil or released hazardous substance. Indirect exposure can result from food chain processes.

(3) If the oil or hazardous substance adhered to, bound to, or otherwise covered surface tissue, or was ingested, or inhaled but not assimilated, the area of dispersion may be determined based upon chemical analysis of the appropriate tissues or organs (such as leaves, lungs, stomach, intestine, or their



contents) that were directly exposed to the oil or hazardous substance.

(4) If the oil or hazardous substance was assimilated, the areal dispersion may be determined based upon one or more of the following alternative procedures:

(i) If direct exposure to the biological resource has occurred, chemical analysis of the organisms that have been exposed may be performed.

(ii) If indirect exposure to the biological resource has occurred, either chemical analysis of free-ranging biological resources using one or more indicator species as appropriate, or laboratory analysis of one or more in situ placed indicator species as appropriate may be performed.

(A) "Indicator species," as used in this section, means a species of organism selected consistent with the following factors to represent a trophic level of a food chain:

(1) General availability of resident organisms in the assessment area;

(2) Potential for exposure to the oil or hazardous substance through ingestion, assimilation, or inhalation;

(3) Occurrence of the substance in a chemical form that can be assimilated by the organism;

(4) Capacity of the organism to assimilate, bioconcentrate, bioaccumulate, and/or biomagnify the substance;

(5) Capacity of the organism to metabolize the substance to a form that cannot be detected through available chemical analytical procedures; and

(6) Extent to which the organism is representative of the food chain of concern.

(B) Collection of the indicator species should be limited to the number necessary to define the areal dispersion and to provide sufficient sample volume for chemical analysis.

(C) When in situ procedures are used, indicator species that behave comparably to organisms existing under free-ranging conditions shall be collected. The indicator species used in this procedure shall be obtained either from a control area selected consistent with provisions of § 11.72 of this part or obtained from a suitable supply of wild-strain organisms reared in a laboratory setting. Appropriate chemical analysis shall be performed on a representative subsample of the indicator species before in situ placement.

(iii) In situ placement procedures shall be used where the collection of samples would be inconsistent with the provisions of § 11.17(b) of this part.

(5) Sampling sites and the number of replicate samples to be collected at the sampling sites shall be consistent with

the quality assurance provisions of the Assessment Plan.

(6) Chemical analysis of biological resource samples collected for the purpose of this section shall be conducted in accordance with the quality assurance provisions of the Assessment Plan.

#### § 11.64 Injury Determination phase—testing and sampling methods.

(a) *General.* (1) The guidance provided in this section shall be followed for selecting methodologies for the Injury Determination phase.

(2) Before selecting methodologies, the objectives to be achieved by testing and sampling shall be defined. These objectives shall be listed in the Assessment Plan. In developing these objectives, the availability of information from response actions relating to the discharge or release, the resource exposed, the characteristics of the oil or hazardous substance, potential physical, chemical, or biological reactions initiated by the discharge or release, the potential injury, the pathway of exposure, and the potential for injury resulting from that pathway should be considered.

(3) When selecting testing and sampling methods, only those methodologies shall be selected:

(i) For which performance under conditions similar to those anticipated at the assessment area has been demonstrated;

(ii) That ensure testing and sampling performance will be cost-effective;

(iii) That will produce data that were previously unavailable and that are needed to make the determinations; and

(iv) That will provide data consistent with the data requirements of the Quantification phase.

(4) Specific factors that should be considered when selecting testing and sampling methodologies to meet the requirements in paragraph (a)(3) of this section include:

(i) Physical state of the discharged or released substance;

(ii) The duration, frequency, season, and time of the discharge or release;

(iii) The range of concentrations of chemical compounds to be analyzed in different media;

(iv) Detection limits, accuracy, precision, interferences, and time required to perform alternative methods;

(v) Potential safety hazards to obtain and test samples;

(vi) Costs of alternative methods; and

(vii) Specific guidance provided in paragraphs (b), (c), (d), (e), and (f) of this section.

(b) *Surface water resources.* (1) Testing and sampling for injury to

surface water resources shall be performed using methodologies described in the Assessment Plan.

(2) Chemical analyses performed to meet the requirements of the Injury Determination phase for surface water resources shall be conducted in accordance with methods that are generally accepted or have been scientifically verified and documented.

(3) The term "water sample" shall denote a volume of water collected and preserved to represent the bulk water and any dissolved or suspended materials or microorganisms occurring in the surface water resource.

(4) Sampling of water and sediments from surface water resources shall be conducted according to generally accepted methods.

(5) Measurement of the hydrologic properties of the resource shall be conducted according to generally accepted methods.

(6) (i) Interpretation of surface-water flow or estimation of transport of oil or hazardous substance in surface water through the use of models shall be based on hydrologic literature and current practice.

(ii) The applicability of models used during the assessment should be demonstrated, including citation or description of the following:

(A) Physical, chemical, and biological processes simulated by the model;

(B) Mathematical or statistical methods used in the model; and

(C) Model computer code (if any), test cases proving the code works, and any alteration of previously documented code made to adapt the model to the assessment area.

(iii) The validity of models used during the assessment should be established, including a description of the following:

(A) Hydraulic geometry, physiographic features, and flow characteristics of modeled reaches or areas;

(B) Sources of hydrological, chemical, biological, and meteorological data used in the model;

(C) Lists or maps of data used to describe initial conditions;

(D) Time increments or time periods modeled;

(E) Comparison of predicted fluxes of water and solutes with measured fluxes;

(F) Calibration-verification procedures and results; and

(G) Types and results of sensitivity analyses made.

(c) *Ground water resources.* (1) Testing and sampling for injury to ground water resources shall be



performed using methodologies described in the Assessment Plan.

(2) Chemical analyses performed to meet the requirements of the Injury Determination phase for ground water resources shall be conducted in accordance with methods that are generally accepted or have been scientifically verified and documented.

(3) (i) The term "water sample" shall denote a volume of water collected and preserved to represent the bulk water and any dissolved or suspended materials or microorganisms occurring in the ground water resource.

(ii) The source of ground water samples may be from natural springs, in seeps, or from wells constructed according to generally accepted methods.

(4) Sampling of ground water or of geologic materials through which the ground water migrates shall be conducted according to generally accepted methods.

(5) Measurement of the geohydrologic properties of the resource shall be conducted according to generally accepted practice.

(6) Description of lithologies, minerals, cements, or other sedimentary characteristics of the ground water resource should follow generally accepted methods.

(7) Interpretation of the geohydrological setting, including identifying geologic layers comprising aquifers and any confining units, shall be based on geohydrologic and geologic literature and generally accepted practice.

(8) (i) Interpretation of ground-water flow systems or estimation of transport of oil or hazardous substances in ground water through the use of models shall be based on geohydrologic literature and current practice.

(ii) The applicability of models used during the assessment should be demonstrated, including citation or description of the following:

(A) Physical, chemical, and biological processes simulated by the model;

(B) Mathematical or statistical methods used in the model; and

(C) Model computer code (if any), test cases proving the code works, and any alteration of previously documented code made to adapt the model to the assessment area.

(iii) The validity of models used during the assessment should be established, including a description of the following:

(A) Model boundary conditions and stresses simulated;

(B) How the model approximates the geohydrological framework of the assessment area;

(C) Grid size and geometry;

(D) Sources of geohydrological, chemical, and biological data used in the model;

(E) Lists or maps of data used to describe initial conditions;

(F) Time increments or time periods modeled;

(G) Comparison of predicted fluxes of water and solutes with measured fluxes;

(H) Calibration-verification procedures and results; and

(I) Type and results of sensitivity analyses made.

(d) *Air resources.* (1) Testing and sampling for injury to air resources shall be performed using methodologies that meet the selection and documentation requirements in this paragraph. Methods identified in this section and methods meeting the selection requirements identified in this section shall be used to detect, identify, and determine the presence and source of emissions of oil or a hazardous substance, and the duration, frequency, period of exposure (day, night, seasonal, etc.), and levels of exposure.

(2) The sampling and analysis methods identified in this paragraph are the primary methods to be used for determining injury to the air resource. Air modeling methods may be used for injury determination only when air sampling and analysis methods are not available or the discharge or release occurred with no opportunity to monitor or sample the emissions.

(3) (i) Methods developed, evaluated, approved, and published by the U.S. Environmental Protection Agency may be used for sampling and analysis to determine injury to the air resource.

(ii) Methods selected for air sampling and analysis may include those methods that have been formally reviewed, evaluated, and published by the following government and professional organizations: the National Institute for Occupational Safety and Health, the American Society for Testing and Materials, and the American Public Health Association.

(iii) Methods selected for air sampling and analysis shall be methods that are documented for each of the following:

(A) The range of field conditions for which the methods are applicable;

(B) Quality assurance and quality control requirements necessary to achieve the data quality the methods are capable of producing;

(C) Operational costs of conducting the methods; and

(D) Time required to conduct the methods.

(iv) The determination of concentrations in excess of emission standards for hazardous air pollutants

established under section 112 of the Clean Air Act, 42 U.S.C. 7412, shall be conducted in accordance with the primary methods or alternative methods as required in "National Emission Standards for Hazardous Air Pollutants: Source Test and Analytical Methods," 40 CFR 61.14, and as may be applicable to the determination of injury to air resources.

(4) In selecting methods for testing and sampling for injury to air resources, the following performance factors of the sampling and analysis methods and the influencing characteristics of the assessment area and the general vicinity shall be considered:

(i) Method detection limits, accuracy, precision, specificity, interferences, and analysis of time and cost;

(ii) Sampling area locations and frequency, duration of sampling, and chemical stability of emissions; and

(iii) Meteorological parameters that influence the transport of emissions and the spatial and temporal variation in concentration.

(e) *Geologic resources.* (1) Testing and sampling for injury to geologic resources shall be performed using methodologies described in this paragraph.

(2) Testing pH level in soils shall be performed using standard pH measurement techniques, taking into account the nature and type of organic and inorganic constituents that contribute to soil acidity; the soil/solution ratio; salt or electrolytic content; the carbon dioxide content; and errors associated with equipment standardization and liquid junction potentials.

(3) Salinity shall be tested by measuring the electrical conductivity of the saturation extraction of the soil.

(4) Soil microbial respiration shall be tested by measuring uptake of oxygen or release of carbon dioxide by bacterial, fungal, algal, and protozoan cells in the soil. These tests may be made in the laboratory or in situ.

(5) Microbial populations shall be tested using microscopic counting, soil fumigation, glucose response, or adenylate energy charge.

(6) Phytotoxicity shall be tested by conducting tests of seed germination, seedling growth, root elongation, plant uptake, or soil-core microcosms.

(7) Injury to mineral resources shall be determined by describing restrictions on access, development, or use of the resource as a result of the oil or hazardous substance. Any appropriate health and safety considerations that led to the restrictions should be documented.



(f) *Biological resources.* (1) Testing and sampling for injury to biological resources shall be performed using methodologies provided for in this paragraph.

(2) (i) Testing may be performed for biological responses that have satisfied the acceptance criteria of § 11.62(f)(2) of this part.

(ii) Testing methodologies that have been documented and are applicable to the biological response being tested may be used.

(3) Injury to biological resources, as such injury is defined in § 11.62(f)(1)(ii) of this part, may be determined by using methods acceptable to or used by the Food and Drug Administration or the appropriate State health agency in determining the levels defined in that paragraph.

#### § 11.70 Quantification phase—general.

(a) *Requirement.* (1) Upon completing the Injury Determination phase, the authorized official shall quantify for each resource determined to be injured and for which damages will be sought, the effect of the discharge or release in terms of the reduction from the baseline condition in the quantity and quality of services, as the phrase is used in this part, provided by the injured resource using the guidance provided in the Quantification phase of this part.

(2) The Quantification phase consists of § 11.70—general; § 11.71—service reduction quantification; § 11.72—baseline services determination; and § 11.73—resource recoverability analysis, of this part.

(b) *Purpose.* The purpose of the Quantification phase is to quantify the effects of the discharge or release on the injured natural resources for use in determining the appropriate amount of compensation.

(c) *Steps in the Quantification phase.* In the Quantification phase, the extent of the injury shall be measured, the baseline condition of the injured resource shall be estimated, the baseline services shall be identified, the recoverability of the injured resource shall be determined, and the reduction in services that resulted from the discharge or release shall be estimated.

(d) *Completion of Quantification phase.* Upon completing the Quantification phase, the authorized official shall make a determination as to the reduction in services that resulted from the discharge or release. This Quantification Determination shall be used in the Damage Determination phase and shall be maintained as part of the Report of Assessment described in § 11.90 of this part.

#### § 11.71 Quantification phase—service reduction quantification.

(a) *Requirements.* (1) The authorized official shall quantify the effects of a discharge of oil or release of a hazardous substance by determining the extent to which natural resource services have been reduced as a result of the injuries determined in the Injury Determination phase of the assessment.

(2) This determination of the reduction in services will be used in the Damage Determination phase of the assessment, and must be consistent with the needs of the economic methodology selected in the determination required in § 11.35 of this part.

(3) Quantification will be done only for resources for which damages will be sought.

(b) *Steps.* Except as provided in § 11.71(f) of this part, the following steps are necessary to quantify the effects:

(1) Measure the extent to which the injury demonstrated in the Injury Determination phase has occurred in the assessment area;

(2) Measure the extent to which the injured resource differs from baseline conditions, as described in § 11.72 of this part, to determine the change attributable to the discharge or release;

(3) Determine the services normally produced by the injured resource, which are considered the baseline services or the without-a-discharge-or-release condition as described in § 11.72 of this part;

(4) Identify interdependent services to avoid double counting in the Damage Determination phase and to discover significant secondary services that may have been disrupted by the injury; and

(5) Measure the disruption of services resulting from the discharge or release, which is considered the change in services or the with-a-discharge-or-release condition.

(c) *Contents of the Quantification.* The following factors should be included in the quantification of the effects of the discharge or release on the injured resource:

(1) Total area, volume, or numbers affected of the resource in question;

(2) Degree to which the resource is affected, including consideration of subunits or subareas of the resource, as appropriate;

(3) Ability of the resource to recover, expressed as the time required for restoration of baseline services as described in § 11.73 of this part;

(4) Proportion of the available resource affected in the area;

(5) Services normally provided by the resource that have been reduced as a result of the discharge or release; and

(6) Factors identified in the specific guidance in paragraphs (h), (i), (j), (k), and (l) of this section dealing with the different kinds of natural resources.

(d) *Selection of resources, services, and methodologies.* Specific resources or services to quantify and the methodology for doing so should be selected based upon the following factors:

(1) Degree to which a particular resource or service is affected by the discharge or release;

(2) Degree to which a given resource or service can be used to represent a broad range of related resources or services;

(3) Consistency of the measurement with the requirements of the economic methodology to be used;

(4) Technical feasibility, as that phrase is used in this part, of quantifying changes in a given resource or service at reasonable cost; and

(5) Preliminary estimates of services at the assessment area and control area based on resource inventory techniques.

(e) *Services.* In quantifying changes in natural resource services, the functions provided in the cases of both with- and without-a-discharge-or-release shall be compared. For the purposes of this part, services include provision of habitat, food and other needs of biological resources, recreation, other products or services used by humans, flood control, ground water recharge, waste assimilation, and other such functions that may be provided by natural resources.

(f) *Direct quantification of services.* The effects of a discharge or release on a resource may be quantified by directly measuring changes in services provided by the resource, instead of quantifying the changes in the resource itself, when it is determined that all of the following conditions are met:

(1) The change in the services from baseline can be demonstrated to have resulted from the injury to the natural resource;

(2) The extent of change in the services resulting from the injury can be measured without also calculating the extent of change in the resource; and

(3) The services to be measured are anticipated to provide a better indication of damages caused by the injury than would direct quantification of the injury itself.

(g) *Statutory exclusions.* In quantifying the effects of the injury, the following statutory exclusions shall be considered, as provided in section 107 (f), (i), and (j) of CERCLA, that exclude compensation for damages to natural resources that were a result of:



(1) An irreversible and irretrievable commitment of natural resources identified in an environmental impact statement or other comparable environmental analysis, and the decision to grant the permit or license authorizes such a commitment, and the facility was otherwise operating within the terms of its permit or license; or

(2) The damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of CERCLA; or

(3) The application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135-135k; or

(4) Any other federally permitted release, as defined in section 101(10) of CERCLA.

(h) *Surface water resources.* (1) The area where the injured surface water resource differs from baseline shall be determined by determining the areal extent of oil or hazardous substances in the water or on the sediments.

(2) (i) Areal variation in concentrations of the discharged or released substances dissolved in or floating on water, adhering to suspended sediments, or adhering to bed, bank, or shoreline sediments from exposed areas should be determined in sufficient detail to approximately map the boundary separating areas with concentrations above baseline from areas with concentrations equal to or less than baseline.

(ii) The size, shape, and location of the plume may be estimated using time of travel and dispersion data obtained under § 11.63 of this part, since plumes of dissolved or floating substances may be rapidly transported and dispersed in surface water.

(3) Water and sediment samples may be collected and chemically analyzed and stage, water discharge, or tidal flux measurements made, as appropriate, to collect new data required by this section.

(4) (i) Within the area determined in paragraph (h)(2) of this section to be above baseline, the services provided by the surface water or sediments that are affected should be determined. This determination may include computation of volumes of water or sediments affected, total areas of water or sediment affected, volume of water used from the affected surface water resource, or other appropriate measures.

(ii) The services should be determined with consideration of potential effects on downstream or downcurrent resources during the recovery period, as determined in § 11.73 of this part, resulting from transport of dissolved

substances and of substances adhering to sediments.

(i) *Ground water resources.* (1) The area where the injured ground water resource differs from baseline should be determined by determining the areal extent of oil or hazardous substances in water or geologic materials in the unsaturated zone and identified geohydrological units, which are aquifers or confining layers, within the assessment area.

(2) (i) The lateral and vertical extent of discharged or released substances in the unsaturated zone, if it is known to be exposed, should be determined.

(ii) The lateral and vertical extent of plumes within geohydrologic units known to be exposed should be determined. Concentrations of substances within and adjacent to each plume should be determined in sufficient detail to approximately locate the boundary separating areas with concentrations above baseline from areas with concentrations equal to or less than baseline.

(3) Water or geologic materials may be sampled and chemically analyzed, or surface-geophysical techniques may be used for collecting new data required by this section. General verification of the plume boundaries by chemical analysis of selected water samples should be done if boundary locations are initially determined by surface-geophysical measurements.

(4) (i) Within the area determined in paragraph (i)(2)(ii) of this section to be above baseline, the services provided by the ground water that is affected should be determined. This determination may include computation of the volume of water affected, volume of affected ground water pumped from wells, volume of affected ground water discharged to streams or lakes, or other appropriate measures.

(ii) The services should be determined with consideration of potential enlargement of the plume during the recovery period, as determined in § 11.73 of this part, resulting from ground water transport of the substances.

(iii) The effects on the ground water resource during the recovery period resulting from potential remobilization of discharged or released substances that may be adhering, coating, or otherwise bonding to geologic materials should be considered.

(j) *Air resources.* The area where the injured air resource differs from baseline should be determined by determining the geographical area affected, the degree of impairment of services, and the period of time impairment occurred.

(k) *Geologic resources.* The area where the injured geologic resource differs from baseline should be determined by determining:

(1) The surface area of soil with reduced ability to sustain the growth of vegetation from the baseline level;

(2) The surface area or volume of soil with reduced suitability as habitat for biota from the baseline level;

(3) The volume of geologic resources that may act as a source of toxic leachate;

(4) The tonnage of mineral resources whose access, development, or use is restricted as a result of the discharge or release.

(l) *Biological resources.* (1) The extent to which the injured biological resource differs from baseline should be determined by analysis of the population or the habitat or ecosystem levels. Although it may be necessary to measure populations to determine changes in the habitats or ecosystems, and vice versa, the final result should be expressed as either a population change or a habitat or ecosystem change in order to prevent double counting in the economic analysis. This separation may be ignored only for resources that do not interact significantly and where it can be demonstrated that double counting is being avoided.

(2) Analysis of population changes or habitat or ecosystem changes should be based upon species, habitats, or ecosystems that have been selected from one or more of the following categories:

(i) Species or habitats that can represent broad components of the ecosystem, either as representatives of a particular ecological type, of a particular food chain, or of a particular service;

(ii) Species, habitats, or ecosystems that are especially sensitive to the oil or hazardous substance and the recovery of which will provide a useful indicator of successful restoration; or

(iii) Species, habitats, or ecosystems that provide especially significant services.

(3) Analysis of populations, habitats, or ecosystems shall be limited to those populations, habitats, or ecosystems for which injury has been determined in the Injury Determination phase or those that can be linked directly through services to resources for which injury has been so determined. Documentation of the service link to the injured resource must be provided in the latter case.

(4) Population, habitat, or ecosystem measurement methods that provide data that can be interpreted in terms of services must be selected. To meet this requirement, a method should:



(i) Provide numerical data that will allow comparison between the assessment area data and the control area or baseline data;

(ii) Provide data that will be useful in planning restoration or replacement efforts and in later measuring the success of those efforts, or that will allow calculation of use values; and

(iii) Allow correction, as applicable, for factors such as dispersal of organisms in or out of the assessment area, differential susceptibility of different age classes of organisms to the analysis methods and other potential systematic biases in the data collection.

(5) When estimating population differences of animals, standard and widely accepted techniques, such as census, mark-recapture, density, and index methods, and other estimation techniques appropriate to the species and habitat shall be used. Frequencies of injury observed in the population shall be measured as applicable.

(i) In general, methods used for estimates of wildlife populations should follow standard and widely accepted techniques such as those recommendations provided in the "Wildlife Management Techniques Manual" (4th edition, Wildlife Society, 1980, available from the Wildlife Society, 5410 Grosvenor Lane, Bethesda, MD 20814), including references cited and recommended in that manual. The specific technique used need not be cited in that manual, but should meet its recommendations for producing reliable estimates or indices.

(ii) Measurement of age structures, life table statistics, or age structure models generally will not provide satisfactory measurement of changes due to a discharge of oil or release of a hazardous substance unless there is clear evidence that the oil or hazardous substance has differentially affected different age classes and there are reliable baseline age structure data available for the population being assessed.

(iii) Mortality from single incidents may be used to estimate changes in populations only when there are available baseline population data for the area, so that the proportion lost can be estimated, and when corrections can be made for potential sampling biases, such as natural mortality and factors influencing distribution of carcasses and ability of investigators to find them. Specific techniques for measuring mortality include the following:

(A) Fish mortality in freshwater areas may be estimated from counts of carcasses, using methods and guidelines for estimating numbers of fish killed contained in Part II (Fish-Kill Counting

Guidelines) of the "Monetary Values of Freshwater Fish and Fish-Kill Counting Guidelines," American Fisheries Society Special Publication Number 13, 1982 (incorporation by reference, see § 11.18), including use of appropriate random sampling methods and tagged carcasses as identified and discussed in Part II of that publication.

(B) The authorized official may adapt the techniques discussed in paragraph (i) (5) (iii) (A) of this section for counting dead aquatic birds or for counting marine or estuarine fish or birds. Such adaptation will require the documentation of the methods used to avoid sampling biases.

(C) Fish mortality may also be estimated by use of an in situ bioassay technique that is similar to that identified in § 11.62(f)(4)(i)(C) of this part, if the oil or hazardous substance is still present at levels that resulted in injury and if appropriate instream controls can be maintained at control areas.

(6) Plant populations may be measured using standard techniques, such as population density, species composition, diversity, dispersion, and cover.

(7) Forest and range resources may be estimated by standard forestry and range management evaluation techniques.

(8) Habitat quality may be measured using techniques such as the Habitat Evaluation Procedures (HEP) developed and used by the U.S. Fish and Wildlife Service.

#### § 11.72 Quantification phase—baseline services determination.

(a) *Requirements.* The authorized official shall determine the physical, chemical, and biological baseline conditions and the associated baseline services for injured resources at the assessment area to compare that baseline with conditions found in § 11.71 of this part.

(b) *General guidelines.* Baseline data shall be selected according to the following general guidelines:

(1) Baseline data should reflect conditions that would have been expected at the assessment area had the discharge of oil or release of hazardous substances not occurred, taking into account both natural processes and those that are the result of human activities.

(2) Baseline data should include the normal range of physical, chemical, or biological conditions for the assessment area or injured resource, as appropriate for use in the analysis in § 11.71 of this part, with statistical descriptions of that variability. Causes of extreme or

unusual value in baseline data should be identified and described.

(3) Baseline data should be as accurate, precise, complete, and representative of the resource as the data used or obtained in § 11.71 of this part. Data used for both the baseline and services reduction determinations must be collected by comparable methods. When the same method is not used, comparability of the data collection methods must be demonstrated.

(4) Baseline data collection shall be restricted to those data necessary for a reasonable cost assessment. In particular, data collected should focus on parameters that are directly related to the injury quantified in § 11.71 of this part and to data appropriate and necessary for the economic methodology selected in § 11.35 of this part.

(5) The authorized official may use or authorize for use baseline data that are not expected to represent fully the baseline conditions, subject to the following requirements:

(i) The authorized official shall document how the requirements of this paragraph are met:

(ii) These substitute baseline data shall not cause the difference between baseline and the conditions in the assessment area to exceed the difference that would be expected if the baseline were completely measured; and

(iii) The authorized official has determined that it is either not technically feasible or not cost-effective, as those phrases are used in this part, to measure the baseline conditions fully and that these baseline data are as close to the actual baseline conditions as can be obtained subject to these limitations.

(c) *Historical data.* If available and applicable, historical data for the assessment area or injured resource should be used to establish the baseline. If a significant length of time has elapsed since the discharge or release first occurred, adjustments should be made to historical data to account for changes that have occurred as a result of causes other than the discharge or release. In addition to specialized sources identified in paragraphs (g) through (k) of this section, one or more of the following general sources of historical baseline data may be used:

(1) Environmental Impact Statements or Environmental Assessments previously prepared for purposes of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4361, similar documents prepared under other Federal and State laws, and background studies done for any of these documents;



(2) Standard scientific and management literature sources appropriate to the resource;

(3) Computerized data bases for the resource in question;

(4) Public or private landholders in the assessment area or in neighboring areas;

(5) Studies conducted or sponsored by Federal or State agencies acting as trustees for the resource in question;

(6) Federally sponsored research identified by the National Technical Information Service;

(7) Studies carried out by educational institutions; and

(8) Other similar sources of data.

(d) *Control areas.* Where historical data are not available for the assessment area or injured resource, or do not meet the requirements of this section, baseline data should be collected from control areas. Historical data for a control area should be used if available and if they meet the guidelines of this section. Otherwise, the baseline shall be defined by field data from the control area. Control areas shall be selected according to the following guidelines, and both field and historical data for those areas should also conform to these guidelines:

(1) One or more control areas shall be selected based upon their similarity to the assessment area and lack of exposure to the discharge or release;

(2) Where the discharge or release occurs in a medium flowing in a single direction, such as a river or stream, at least one control area upstream or upcurrent of the assessment area shall be included, unless local conditions indicate such an area is inapplicable as a control area;

(3) The comparability of each control area to the assessment area shall be demonstrated, to the extent technically feasible, as that phrase is used in this part;

(4) Data shall be collected from the control area over a period sufficient to estimate normal variability in the characteristics being measured and should represent at least one full cycle normally expected in that resource;

(5) Methods used to collect data at the control area shall be comparable to those used at the assessment area, and shall be subject to the quality assurance provisions of the Assessment Plan;

(6) Data collected at the control area should be compared to values reported in the scientific or management literature for similar resources to demonstrate that the data represent a normal range of conditions; and

(7) A control area may be used for determining the baseline for more than one kind of resource, if sampling and data collection for each resource do not

interfere with sampling and data collection for the other resources.

(e) *Baseline services.* The baseline services associated with the physical, chemical, or biological baseline data shall be determined.

(f) *Other requirements.* The methodologies in paragraphs (g) through (k) of this section shall be used for determining baseline conditions for specific resources in addition to following the general guidelines identified in paragraphs (a) through (e) of this section. If a particular resource is not being assessed for the purpose of the Damage Determination phase, and data on that resource are not needed for the assessment of other resources, baseline data for the resource shall not be collected.

(g) *Surface water resources.* (1) This paragraph provides additional guidance on determining baseline services for surface water resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the surface water resource at the assessment area. If deemed inadequate for determining baseline conditions, such data shall be used to the extent technically feasible, as that phrase is used in this part, in designating the control areas described in paragraph (g)(3) of this section for the surface water resource determined to be injured.

(3) Control areas shall be selected for the surface water resource subject to the general criteria in paragraph (d) of this section and additional criteria as follows:

(i) For each injured stream or river reach, a control area shall be designated consisting of a stream or river reach of similar size, that is as near to the assessment area as practical and, if practical, that is upstream or upcurrent from the injured resource, such that the channel characteristics, sediment characteristics, and streamflow characteristics are similar to the injured resource and the water and sediments of the control area, because of location, have not been exposed to the discharge or release.

(ii) For each injured standing water body, such as a marsh, pond, lake, bay, or estuary, a control area shall be designated consisting of a standing water body of similar size that is as near to the assessment area as practical, such that the sediment characteristics and inflow-outflow characteristics of the control area are similar to the injured resource and the water and sediments of

the control area, because of location, have not been exposed to the discharge or release.

(4) (i) Within the control area locations shall be designated for obtaining samples of water and sediments.

(ii) The water discharge, stage, or tidal flux shall be measured and representative water and sediments collected as follows:

(A) Measure stage, water discharge, and tidal flux as appropriate at the same time that water and sediment samples are collected; and

(B) Obtain comparable samples and measurements at both the control and assessment areas under similar hydraulic conditions.

(iii) Measurement and samples shall be obtained as described in this paragraph in numbers sufficient to determine:

(A) The approximate range of concentration of the substances in water and sediments;

(B) The variability of concentration of the substances in water and sediments during different conditions of stage, water discharge, or tidal flux; and

(C) The variability of physical and chemical conditions during different conditions of stage, water discharge, or tidal flux relating to the transport or storage of the substances in water and sediments.

(5) Samples should be analyzed from the control area to determine the physical properties of the water and sediments, suspended sediment concentrations in the water, and concentrations of oil or hazardous substances in water or in the sediments. Additional chemical, physical, or biological tests may be made, if necessary, to obtain otherwise unavailable data for the characteristics of the resource and comparison with the injured resource at the assessment area.

(6) In order to establish that differences between surface water conditions of the control and assessment areas are statistically significant, the median and interquartile range of the available data or the test results should be compared using the Mann-Whitney and ranked squares tests, respectively.

(7) Additional tests may be made of samples from the control area, if necessary, to provide otherwise unavailable information about physical, chemical, or biochemical processes occurring in the water or sediments relating to the ability of the injured surface water resource to recover naturally.



(h) *Ground water resources.* (1) This paragraph provides additional guidance on determining baseline services for ground water resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the ground water resource at the assessment area. If deemed inadequate for determining baseline conditions, such data shall be used to the extent technically feasible, as that phrase is used in this part, in designating the control areas described in paragraph (h)(3) of this section for the ground water resource determined to be injured.

(3) A control area shall be designated subject to the general criteria in paragraph (d) of this section and as near to the assessment area as practical, such that, within the control area, geological materials, geohydrological units, and hydrologic conditions are similar to the assessment area, and ground water resources are not exposed to substances from the discharge or release.

(4) Within the control area, wells shall be identified or drilled, designated as control wells, to obtain representative ground water samples for analysis. The location, depth, and number of control wells and the number of ground water samples collected should be sufficient to estimate the vertical and lateral variation in concentration of the substances in both the unsaturated zone and in ground water from geohydrologic units similar to units tested in the assessment area.

(i) Representative water samples from each control well shall be collected and analyzed. The analyses should determine the physical and chemical properties of the ground water relating to the occurrence of oil or hazardous substances.

(ii) If the oil or hazardous substances are commonly more concentrated on geologic materials than in ground water, representative samples of geologic materials from aquifers and the unsaturated zone as appropriate should be obtained and chemically analyzed. The location, depth, and number of these samples should be sufficient to determine the vertical and lateral variation in concentration of the oil or hazardous substances absorbing or otherwise coating geologic materials in the control area. These samples may also be analyzed to determine porosity, mineralogy, and lithology of geologic materials if these tests will provide otherwise unavailable information on storage or mobility of the oil or

hazardous substances in the ground water resource.

(5) In order to establish that differences between ground water conditions of the control and assessment areas are statistically significant, the median and interquartile range of available data or the test results from similar geohydrologic units should be compared using the Mann-Whitney and ranked squares test, respectively.

(6) Additional tests may be made of samples from the control area, if necessary, to provide otherwise unavailable information about chemical, geochemical, or biological processes occurring in the ground relating to the ability of the injured ground water resource to recover naturally.

(i) *Air resources.* (1) This paragraph provides additional guidance on determining baseline services for air resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered on ambient air quality and source emissions to determine baseline conditions for the air resource. These historical data may be used to determine baseline conditions if the data satisfy the general guidelines in paragraph (d) of this section and if all the following criteria are met:

(i) The methodology used to obtain these historical data would detect the oil or hazardous substance at levels appropriate for comparison to the concentrations measured in § 11.71 of this part;

(ii) The effect of known or likely emission sources near the assessment area other than the source of the discharge or release can be identified or accounted for in the historical data; and

(iii) The historical data show that normal concentrations of the oil or hazardous substance are sufficiently predictable that changes as a result of the discharge or release are likely to be detectable.

(3) If historical data appropriate to determine baseline conditions at the assessment area are lacking, one or more control areas, as needed, shall be designated subject to the general criteria of paragraph (d) of this section and the following additional factors, which shall also be considered in establishing a monitoring schedule:

(i) Applicable and available historical data shall be used to the extent technically feasible, as that phrase is used in this part, in designating control areas or, lacking historical data, the

factors in paragraph (i)(3)(iii) of this section shall be considered;

(ii) Control areas shall be spatially representative of the range of air quality and meteorological conditions likely to have occurred at the assessment area during the discharge or release into the atmosphere; and

(iii) The following additional factors shall be considered:

(A) The nature of the discharge or release and of potential alternative sources of the oil or hazardous substance, including such factors as existing sources, new sources, intermittent sources, mobile sources, exceptional events, trends, cycles, and the nature of the material discharged or released;

(B) Environmental conditions affecting transport, such as wind speed and direction, atmospheric stability, temperature, humidity, solar radiation intensity, and cloud cover; and

(C) Other factors, such as timing of the discharge or release, use patterns of the affected area, and the nature of the injury resulting from the discharge or release.

(4) (i) The preferred measurement method is to measure air concentrations of the oil or hazardous substance directly using the same methodology employed in § 11.71 of this part.

(ii) Nonspecific or chemical compound class methodologies may be used to determine baseline generically only in situations where it can be demonstrated that measuring indicator substances will adequately represent air concentrations of other components in a complex mixture.

(j) *Geologic resources.* (1) This paragraph provides additional guidance on determining baseline services for geologic resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the geologic resource at the assessment area. If deemed inadequate for determining baseline conditions, such data shall be used to the extent technically feasible, as that phrase is used in this part, in designating the control areas described in paragraph (j)(3) of this section for the geologic resource determined to be injured.

(3) Control areas shall be selected for geologic resources subject to the general criteria in paragraph (d) of this section and additional criteria as follows:

(i) Similarity of exposed soil or geologic material in the assessment area



with the geologic resource in the control area should be the primary factor in selecting the control area. Other factors, including climate, depth of ground water, vegetation type and area covered, land slope and land area, and hydraulic gradients and spatial relation to source should be comparable to the assessment area.

(ii) The control area shall be selected such that the geologic resource in the control area is not exposed to the discharge or release.

(4)(i) A sufficient number of samples from unbiased, randomly selected locations in the control area shall be obtained in order to characterize the areal variability of the parameters measured. Each sample should be analyzed to determine the physical and chemical properties of the geologic materials relating to the occurrence of the oil or hazardous substance. Additional chemical, physical, or biological tests may be made, if necessary, to obtain otherwise unavailable data for the characterization and comparison with the injured resource at the assessment area.

(ii) The mean and standard deviation of each parameter measured shall be used as the basis of comparison between the assessment and control areas.

(k) *Biological resources.* (1) This paragraph provides additional guidance on determining baseline services for biological resources. The general guidance provided in paragraphs (a) through (f) of this section should be followed before beginning any work described in this paragraph.

(2) Applicable and available historical data shall be gathered to determine baseline conditions for the biological resource at the assessment area and should include both population and habitat data if available. These data may be derived from the data sources identified in paragraph (c) of this section, as well as from the following:

(i) Aerial photographs or maps showing distribution and extent of habitat types or other biological resources before the discharge or release;

(ii) Biological specimens in systematic museum or herbarium collections and associated records, including labels and collectors' field notes; and

(iii) Photographs showing the nature of the habitat before the discharge or release when the location and date are well documented.

(3)(i) Control areas shall be selected for biological resources subject to the general criteria in paragraph (d) of this

section and additional criteria as follows:

(A) The control area shall be comparable to the habitat or ecosystem at the assessment area in terms of distribution, type, species composition, plant cover, vegetative types, quantity, and relationship to other habitats;

(B) Physical characteristics of the control and assessment areas shall be similar; and

(C) If more than one habitat or ecosystem type is to be assessed, comparable control areas should be established for each, or a control area should be selected containing those habitat types in a comparable distribution.

(ii) To the extent they are available, historical data should be gathered and used for the control area. Lacking adequate historical data for both the control and assessment areas, the control areas shall be used for the following purposes, as appropriate to the quantification:

(A) To measure baseline biota population levels or habitat or ecosystem quality, as discussed in § 11.71(l) of this part; and

(B) To measure the natural frequency, if any, of the injury being assessed in unaffected populations or to demonstrate the lack of that injury in unaffected populations if these have not been done for purposes of the Injury Determination, and if needed for purposes of the Quantification.

(4) In addition, a control area should be used to collect control specimens, as needed, for the Injury Determination procedures.

(5) The identity of species for which Damage Determinations will be made or that play an important role in the assessment shall be confirmed except in the case where collecting the specimens of a species is likely to compromise the restoration of the species. One or more of the following methods shall be used:

(i) Specimens of the species shall be provided to an independent taxonomist or systematic biologist, who has access to a major systematic biology collection for that taxon, and who shall provide written confirmation of their identity to the species level;

(ii) A reference collection of specimens of the species, prepared and preserved in a way standard for systematic collections for that taxon, shall be maintained at least through final resolution of the damage action at which time it should be transferred to a major systematic biology collection; or

(iii) In the case of a species where collecting specimens is likely to compromise the recovery or restoration of that species population, the

authorized official shall determine and use an alternative method for confirming species identity that will be consistent with established management goals for that species.

#### § 11.73 Quantification phase—resource recoverability analysis.

(a) *Requirement.* The time needed for each injured resource to recover to the state that the authorized official determines services are restored to baseline levels shall be estimated. The time estimated for recovery or any lesser period of time as determined in the Assessment Plan shall be used as the recovery period for purposes of § 11.35 and the Damage Determination phase, §§ 11.80 through 11.84, of this part.

(1) In all cases, the amount of time needed for recovery if no restoration efforts are undertaken beyond response actions performed or anticipated shall be estimated. This time period shall be used as the "No Action-Natural Recovery" period for purposes of § 11.82 and § 11.84(g)(2)(ii) of this part.

(2) The estimated time for recovery shall be included in any alternatives for restoration, as developed in § 11.81 of this part, and the data and process by which these recovery times were estimated shall be documented.

(b) *Restoration not feasible.* If the authorized official determines that restoration will not be technically feasible, as that phrase is used in this part, the reasoning and data on which this decision is based shall be documented as part of the justification for any replacement alternatives that may be considered or proposed.

(c) *Estimating recovery time.* (1) The time estimates required in paragraph (a) of this section shall be based on the best available information and where appropriate may be based on cost-effective models. Information gathered may come from one or more of the following sources, as applicable:

(i) Published studies on the same or similar resources;

(ii) Other data sources identified in § 11.72 of this part;

(iii) Experience of managers or resource specialists with the injured resource;

(iv) Experience of managers or resource specialists who have dealt with restoration for similar discharges or releases elsewhere; and

(v) Field and laboratory data from assessment and control areas as necessary.

(2) The following factors should be considered when estimating recovery times:



- (i) Ecological succession patterns in the area;
- (ii) Growth or reproductive patterns, life cycles, and ecological requirements of biological species involved, including their reaction or tolerance to the oil or hazardous substance involved;
- (iii) Bioaccumulation and extent of oil or hazardous substances in the food chain;
- (iv) Chemical, physical, and biological removal rates of the oil or hazardous substance from the media involved, especially as related to the local conditions, as well as the nature of any potential degradation or decomposition products from the process including:
  - (A) Dispersion, dilution, and volatilization rates in air, sediments, water, or geologic materials;
  - (B) Transport rates in air, soil, water, and sediments;
  - (C) Biological degradation, depuration, or decomposition rates and residence times in living materials;
  - (D) Soil or sediment properties and adsorption-desorption rates between soil or sediment components and water or air;
  - (E) Soil surface runoff, leaching, and weathering processes; and
  - (F) Local weather or climatological conditions that may affect recovery rates.

**§ 11.80 Damage Determination phase—general.**

(a) *Requirement.* (1) The authorized official shall estimate the damages resulting from the discharge of oil or release of a hazardous substance based upon the information provided in the Quantification phase and the guidance provided in the Damage Determination phase.

(2) The Damage Determination phase consists of § 11.80—general; § 11.81—restoration methodology; § 11.82—Restoration Methodology Plan; § 11.83—use value methodologies; and § 11.84—implementation guidance, of this part.

(b) *Purpose.* The purpose of the Damage Determination phase is to estimate the amount of money to be sought for compensation for injury to natural resources resulting from a discharge of oil or release of a hazardous substance.

(c) *Steps in the Damage Determination phase.* Based upon the decisions arrived at in the Economic Methodology Determination prepared in § 11.35 of this part, as part of the Assessment Plan concerning the appropriate measure of damages to be employed during the Damage Determination phase, the authorized official shall use either the restoration methodology provided in § 11.81 of this

part or one of the use value methodologies provided in § 11.83 of this part to calculate damages. For assessments that use the restoration methodology, a Restoration Methodology Plan described in § 11.82 of this part shall be prepared. The guidance provided in § 11.84 of this part shall be followed in implementing either the restoration methodology or one of the use value methodologies, as appropriate.

(d) *Completion of the Damage Determination.* Upon completion of the Damage Determination phase, the type B assessment is completed. The results of the Damage Determination phase shall be documented in the Report of Assessment described in § 11.90 of this part.

**§ 11.81 Damage Determination phase—restoration methodology.**

(a) *Requirement.* The guidance provided in this section shall be followed when estimating damages based upon the restoration or replacement of the public services as identified in § 11.72 of this part.

(b) *Diminution of uses.* Damages based on restoration or replacement costs may include any diminution of use values, as described in § 11.84, of this part, occurring during the recovery period as determined in § 11.73 of this part.

(c) *Measurement.* (1) Restoration or replacement measures are limited to those actions that restore or replace the resource services to no more than their baseline, that is, the without-a-discharge-or-release condition as determined in § 11.72 of this part.

(2) The resource services previously provided by the injured resource in its baseline condition shall be identified in accordance with § 11.72 of this part and compared with those services provided by the injured resource, that is, the with-a-discharge-or-release condition. All estimates of the with-a-discharge-or-release condition shall incorporate the ability of the resource to recover as determined in § 11.73 of this part.

(d) *Alternatives.* (1) Alternative methods to achieve the restoration or replacement of the resource services shall be developed. Alternative methods may range from the replacement of individual resources to modification or restoration of a habitat or other resource.

(2) Selection of the cost-effective restoration or replacement methodology shall be documented in the Restoration Methodology Plan as required in § 11.82 of this part.

(e) *Evaluation.* (1) The costs of the alternative restoration or replacement

methods developed in paragraph (d) of this section shall be evaluated. When an alternative requires the replacement of a resource, local prices should be used when available for those resources.

(2) In determining the costs of restoration or replacement, the acquisition of land for Federal management should be used only if this acquisition would represent the sole viable method of obtaining the lost services.

(f) *Damages.* (1) The damage amount as measured by restoration or replacement is the cost to accomplish the cost-effective alternative that provides the lost services.

(2) All restoration or replacement techniques, management methods, and methodologies must be technically feasible, as that phrase is used in this part.

**§ 11.82 Damage Determination phase—Restoration Methodology Plan.**

(a) *Requirement.* In instances where the authorized official has determined, based upon the Economic Methodology Determination in § 11.35 of this part, that restoration or replacement costs will form the basis of the measure of damages, a Restoration Methodology Plan shall be developed in accordance with the requirements of this section.

(b) *Purposes.* The purposes of the Restoration Methodology Plan are to ensure that the restoration or replacement alternative that forms the basis of the measure of damages is cost-effective and to serve as a basis for the more detailed restoration or replacement plan that shall be completed after a damage award.

(c) *Uses of the Plan.* (1) The expected present value of the costs of the restoration or replacement alternative selected shall be used as the measure of damages in any action or claim for damages under CERCLA or the CWA.

(2)(i) The Restoration Methodology Plan, updated and otherwise revised to reflect new information, shall be used as the basis of any restoration or replacement decision or plans that may be developed after the damage award has been made.

(ii) For purposes of submitting claims against the Fund, the requirements of 40 CFR 306.22 will need to be fulfilled before restoration work is authorized.

(d) *Plan content.* (1) The Restoration Methodology Plan shall describe all management actions or resource acquisitions to be taken consistent with the restoration or replacement decisions.

(2)(i) The Restoration Methodology Plan shall include a range of restoration and replacement alternatives that



restore the lost services to no more than their baseline level. These alternatives shall include a "No Action-Natural Recovery" alternative and other alternatives that reflect varying rates of recovery, management actions, and resource acquisitions.

(ii) The "No Action-Natural Recovery" alternative shall be based upon the determination made in § 11.73(a)(1) of this part concerning the ability of the resource to recover without additional actions beyond those response actions taken or anticipated under the NCP and normal management actions.

(iii) The development of the alternatives should be consistent with the requirements of any Federal or State statute concerning the injured resource, should consider techniques currently available in the biological and physical sciences, engineering, or economic and other management sciences, and should consider the long-term and indirect impacts of the restoration or replacement on other resources.

(iv)(A) An alternative that requires the acquisition of land for Federal management shall not be developed unless in the judgment of the Federal agency acting as trustee such acquisition constitutes the only viable method of obtaining the lost services.

(B) If the acquisition of land for Federal management constitutes the only viable method of obtaining the lost services, the appropriation process must be included in the scheduling of such acquisition since funding for such acquisition will have to be obtained through appropriations.

(3)(i) The Restoration Methodology Plan shall be of sufficient detail to evaluate the alternatives for the purpose of selecting the cost-effective method of restoring or replacing the lost services.

(ii) The cost-effective alternative shall be determined in accordance with the following:

(A) The description of the alternatives shall include cost and timing of expenditures;

(B) The guidance provided for discount rates in § 11.84(e) of this part shall be used; and

(C) The guidance provided for calculating the diminution of use values over the period of time required for restoration or replacement in § 11.84(g) of this part.

(e) *Plan development.* (1) In developing the Restoration Methodology Plan, the guidance provided in § 11.81 of this part shall be followed.

(2)(i) The Restoration Methodology Plan shall be made available for review by any identified potentially responsible party, other Federal or State agencies acting as trustees, other affected Federal

or State agencies, and any other interested members of the public for a period of at least 30 calendar days, with reasonable extensions granted as appropriate, before the authorized official's final decision on selection of the alternative.

(ii) Comments received from any identified potentially responsible party, other Federal or State agencies acting as trustees, other affected Federal or State agencies, or any other interested members of the public, together with responses to those comments shall be included as part of the Report of Assessment, described in § 11.90 of this part.

(3) The Restoration Methodology Plan may be combined with other similar plans or may be expanded to incorporate requirements from procedures required under other portions of CERCLA or the CWA or from other Federal or State statutes applicable to restoration or replacement of the injured resource, so long as the requirements of this section are fulfilled.

(f) *Selection of alternative.* (1) The cost-effective alternative shall be selected as the basis for the measure of damages from among those evaluated in the Restoration Methodology Plan.

(2) The authorized official has the responsibility for the final approval of selection of the appropriate restoration or replacement alternative.

(g) *Costs of management actions.* Costs of management actions within the Restoration Methodology Plan may include:

(1) Net present value of capital costs for restoration and replacement; and

(2) Net present value of operating costs for restoration and replacement.

#### § 11.83 Damage Determination phase—use value methodologies.

(a) *Requirement.* (1) The methodologies listed, or other methodologies that meet the acceptance criterion provided in this section, shall be used to estimate damages based on a diminution of use values.

(2) In estimating use values, either a marketed or nonmarketed resource methodology, as described in paragraphs (c) and (d) of this section shall be used.

(3) In using the nonmarketed resource methodologies in paragraph (d) of this section, the applicable guidance on the travel cost, contingent valuation, and unit value methodologies found in "National Economic Development (NED) Benefit Evaluation Procedures" (Procedures), in *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies*,

Chapter II, Section VIII, Appendices 1-3, U.S. Department of the Interior, Water Resources Council, Washington, DC, 1983 (incorporated by reference, see § 11.18), shall be followed.

(4) Nothing in this part precludes the use of different methodologies for separate damage estimates for different resources.

(b) *Use values.* (1) For the purposes of this part, use values are the value to the public of recreational or other public uses of the resource, as measured by changes in consumer surplus, any fees or other payments collectable by the government for a private party's use of the natural resource, and any economic rent accruing to a private party because the government does not charge a fee or price for the use of the resource.

(2) Estimation of option and existence values shall be used only if the authorized official determines that no use values can be determined.

(3) In instances where the Federal or State agency acting as trustee is the majority operator or controller of a for- or not-for-profit enterprise, and the injury to the natural resource results in a loss to such an enterprise, that portion of the lost net income due the agency from this enterprise resulting directly or indirectly from the injury to the natural resource may be included as a measure of damages under this part.

(c) *Marketed resource methodologies.*

(1) A determination shall be made as to whether the market for the resource is reasonably competitive. Unless the authorized official determines that the market for the resource is not reasonably competitive, the diminution in the market price of the resource shall be used to estimate the damages to the injured resource. This methodology shall be referred to as the market price methodology.

(2) When the authorized official determines that the market price methodology is not appropriate, the appraisal methodology shall be used if sufficient information exists. Damages should be measured, to the extent possible, in accordance with the applicable sections of the "Uniform Appraisal Standards for Federal Land Acquisition" (Uniform Appraisal Standards), Interagency Land Acquisition Conference, Washington, DC, 1973 (incorporated by reference, see § 11.18). The measure of damages under this appraisal methodology shall be the difference between the with- and without-injury appraisal value determined by the comparable sales approach as described in the Uniform Appraisal Standards.



(d) *Nonmarketed natural resource methodologies.* (1) Only when the authorized official has determined that neither the market price nor the appraisal methodology is appropriate shall the methodologies listed in this section or those that meet the acceptance criterion in paragraph (d)(7) of this section be used to estimate a diminution of use value for the purposes of this part.

(2) If the lost resource is an input to a production process, which has as an output a product with a well-defined market price, the factor income methodology can be used. This methodology should be used to estimate the economic rent associated with the use of a resource in the production process and is sometimes referred to as the "reverse value added" method. The factor income methodology should be used to measure the in-place value of the resource.

(3) The travel cost methodology may be used to estimate a value for the use of a specific area. An individual's incremental travel costs to an area are used as a proxy for the price of the services of that area. Damages to the area are the difference between the value of the area with- and without-a-discharge-or-release. When regional travel cost models exist, they should be used if appropriate.

(4) Hedonic pricing methodologies may be used to estimate the value of a resource. These methodologies can be used to determine the value of nonmarketed resources by an analysis of private market choices. The demand for nonmarketed natural resources is thereby estimated indirectly by an analysis of commodities that are traded in a market.

(5) (i) The contingent valuation methodology includes all techniques that set up hypothetical markets to elicit an individual's economic valuation of a natural resource. This methodology can determine use values and explicitly determine option and existence values.

(ii) The use of the contingent valuation methodology to explicitly estimate option and existence values should be used only if the authorized official determines that no use values can be determined.

(6) Unit values are preassigned dollar values for various types of nonmarketed recreational or other experiences by the public. Where feasible, regional unit values and unit values that closely resemble the recreational or other experience lost should be used.

(7) Other nonmarketed resource methodologies that measure use values in accordance with willingness to pay, in a cost-effective manner, are

acceptable methodologies to estimate damages under this part.

#### **§ 11.84 Damage Determination phase—implementation guidance.**

(a) *Requirement.* The damage estimation methodologies in § 11.81 and § 11.83 of this part should be implemented following the appropriate guidance in this section and that in § 11.35 of this part.

(b) *Determining uses.* (1) Before estimating damages based on the diminution of use values under § 11.83 of this part, the uses made of the resource services identified in the Quantification phase should be determined.

(2) Only committed uses, as that phrase is used in this part, of the resource or services over the recovery period will be used to measure the change from the baseline resulting from injury to a resource. The baseline uses must be reasonably probable, not just in the realm of possibility. Purely speculative uses of the injured resource are precluded from consideration in the estimation of damages.

(3) (i) When resources or resource services have mutually exclusive uses, the highest-and-best use of the injured resource or services, as determined by the authorized official, shall be used as the basis of the analyses required in this part. This determination of the highest-and-best use must be consistent with the requirements of paragraph (b)(2) of this section.

(ii) If the uses of the resource or service are not necessarily mutually exclusive, the sum of damages should be determined from individual services. However, the sum of the projected damages from individual services shall consider congestion or crowding out effects, if any, from the resulting projected total use of those services.

(c) *Double counting.* (1) Double counting of damages should be avoided. Double counting means that a benefit or cost has been counted more than once in the damage assessment.

(2) Natural resource damages are the residual to be determined by incorporating the effects, or anticipated effects, of any response actions. To avoid one aspect of double counting, the effects of response actions shall be factored into the analysis of damages. If response actions will not be completed until after the assessment has been initiated, the anticipated effects of such actions should be included in the assessment.

(d) *Uncertainty.* (1) When there are significant uncertainties concerning the assumptions made in all phases of the assessment process, reasonable alternative assumptions should be

examined. In such cases, uncertainty should be handled explicitly in the analysis and documented. The uncertainty should be incorporated in the estimates of benefits and costs.

(2) To incorporate this uncertainty, a range of probability estimates for the important assumptions used to determine damages should be derived. In these instances, the damage estimate shall be the net expected present value of: restoration or replacement costs; or diminution of use values.

(e) *Discounting.* (1) Where possible, damages should be estimated in the form of an expected present value dollar amount. In order to perform this calculation, a discount rate must be selected.

(2) The discount rate to be used is that specified in "Office of Management and Budget (OMB) Circular A-94 Revised" (dated March 27, 1972, available from the Executive Office of the President, Publications, 726 Jackson Place, NW, Washington, DC 20503; ph: (202) 395-7372).

(f) *Substitutability.* In calculating the diminution of use values, the estimates of the ability of the public to substitute uses for those of the injured services should be incorporated. This substitutability shall be estimated only if the potential benefits from an increase in accuracy are greater than the potential costs.

(g) *Diminution of use in restoration or replacement.* (1) If restoration or replacement is to form the basis of the measure of damages, the diminution of use values during the period of time required to obtain restoration or replacement may also be included in the measure of damages.

(2) To calculate the diminution of use values during the period of time required to obtain restoration or replacement, the procedures described below should be followed. It is not necessary that they be followed in sequence.

(i) The ability of the resource to recover over the recovery period should be estimated. This estimate includes estimates of natural recovery rates as well as recovery rates that reflect management actions or resource acquisitions to achieve restoration or replacement.

(ii) A recovery rate should be selected for this analysis that is based upon cost-effective management actions or resource acquisitions, including a "No Action-Natural Recovery" alternative. After the recovery rate is estimated, the diminution in use values should be estimated.

(iii) The rate at which the uses of the injured resource will be restored through



the restoration or replacement of the services should be estimated. This rate may be discontinuous, that is, no uses are restored until the services are restored, or continuous, that is, restoration of uses will be a function of the level and rate of restoration or replacement of the services. Where practicable, the supply of and demand for the restored services should be analyzed, rather than assuming that the services will be utilized at their full capacity at each period of time in the analysis. These use values should be discounted using the rate described in paragraph (e)(2) of this section. This estimate is the expected present value of uses obtained through restoration or replacement.

(iv) The uses of the resource that would have occurred in the absence of the discharge or release should be estimated. This estimate should be done in accordance with the procedures in § 11.72 of this part. These uses should be estimated over the same time period using the same discount rate as that specified in paragraph (e)(2) of this section. This amount is the expected present value of uses forgone.

(v) Subtraction of the present value of uses obtained through restoration or replacement from the expected present value of uses forgone gives the amount of compensation that may be included, if positive, in a measure of damages.

(h) *Incorporating natural recovery in use values.* If use values will form the measure of damages, the natural ability of the resource to recover as determined in § 11.73 of this part shall be used to estimate the diminution of use values. The same procedures as those in paragraph (g)(2) of this section should be followed to determine the diminution of use values, except that only the natural rate of recovery, as determined by the analysis required in § 11.73 of this part and any normal management actions, shall be used.

(i) *Scope of the analysis.* (1) The authorized official must determine the scope of the analysis in order to estimate a diminution of use values.

(2) In assessments where the scope of analysis is Federal, only the diminution of use values to the Nation as a whole should be counted.

(3) In assessments where the scope of analysis is at the State level, only the diminution of use values to the State should be counted.

#### Subpart F—Post-Assessment Phase

##### § 11.90 Post-assessment phase—Report of Assessment.

(a) *Requirement.* At the conclusion of either a type A or type B assessment, the

authorized official shall prepare a Report of Assessment that shall consist of the Preassessment Screen Determination, the Assessment Plan, and the requirements of paragraphs (b) or (c) of this section as appropriate.

(b) *Type A assessments.* For a type A assessment conducted in accordance with the guidance in Subpart D of this part, the Report of Assessment shall include the results of that assessment.

(c) *Type B assessments.* For a type B assessment conducted in accordance with the guidance in Subpart E of this part, the Report of Assessment shall consist of all the documentation supporting the determinations required in the Injury Determination phase, the Quantification phase, and the Damage Determination phase, and specifically including the test results of any and all methodologies performed in these phases. Where the basis for the measure of damages is restoration or replacement costs, the Restoration Methodology Plan shall also be included in the Report of Assessment.

##### § 11.91 Post-assessment phase—demand.

(a) *Requirement and content.* At the conclusion of the assessment the authorized official shall present to the responsible party a demand in writing for a sum certain, representing the damages determined in accordance with the requirements and guidance of § 11.80 of this part, including the reasonable cost of the assessment, and as adjusted, if necessary, by the guidance in § 11.92(d) of this part, delivered in such a manner as will establish the date of receipt. The demand shall adequately identify the Federal or State agency asserting the claim, the general location and description of the injured resource, identification of the type of discharge or release determined to have resulted in the injuries, and the damages sought from that party.

(b) *Report of Assessment.* The demand letter shall include the Report of Assessment as an attachment.

(c) *Rebuttable presumption.* When performed by a Federal official in accordance with this part, the natural resource damage assessment and the resulting damage determination supported by a complete administrative record of the assessment including the Report of Assessment as described in § 11.90 of this part shall have the force and effect of a rebuttable presumption on behalf of any claimant in any judicial or adjudicatory administrative proceeding under CERCLA or section 311 of the CWA.

(d) *Responsible party response.* The authorized official should allow at least 60 days from receipt of the demand by

the responsible party, with reasonable extensions granted as appropriate, for the responsible party to acknowledge and respond to the demand.

##### § 11.92 Post-assessment phase—restoration account.

(a) *Disposition of Recoveries.* (1) Except as provided in paragraphs (b) and (c) of this section, all sums awarded pursuant to section 107(a)(4)(C) of CERCLA or section 311(f) (4) and (5) of the CWA to the Federal government acting as trustee shall be placed in a separate account in the United States Treasury.

(2) Except as provided in paragraph (c) of this section, all sums awarded pursuant to section 107(a)(4)(C) of CERCLA or section 311(f) (4) and (5) of the CWA to a State government acting as trustee shall either:

(i) Be placed in a separate account in the State treasury; or

(ii) Be placed by the responsible party or parties in an interest bearing account payable in trust to the State agency acting as trustee.

(b) *Land acquisition.* Any monies awarded for the purpose of acquiring land for Federal management shall be deposited in the general fund of the United States Treasury. Federal agencies shall acquire land for Federal management solely with monies appropriated for that purpose.

(c) *Reimbursement for costs.* Sums awarded as reimbursement for the reasonable costs of conducting the assessment shall be payable to the appropriate treasury of the Federal or State agency that incurred the costs.

(d) *Adjustments.* (1) In establishing the account pursuant to paragraph (a) of this section, the calculation of the expected present value of the damage amount should be adjusted, as appropriate, whenever monies are to be placed in a non-interest bearing account. This adjustment should correct for the anticipated effects of inflation over the time estimated to complete expenditures for the restoration or replacement.

(2) In order to make the adjustment in paragraph (d)(1) of this section, the authorized official acting as trustee should adjust the damage amount by the rate payable on notes or bonds issued by the United States Treasury with a maturity date that approximates the length of time estimated to complete expenditures for the restoration or replacement.

(e) *Payments from the account.* Monies shall be paid out of the account established pursuant to paragraph (a) of this section only for those actions



described in the Restoration Plan required by § 11.93 of this part.

(f) *Hazardous Substance Response Trust Fund Claims.* Claims against the Hazardous Substance Response Trust Fund must be for costs incurred as specified by the procedures promulgated by EPA at 40 CFR 306.

#### § 11.93 Post-assessment phase—Restoration Plan.

(a) Upon determination of the amount of the award of a natural resource damage claim as authorized by section 107(a)(4)(C) of CERCLA, or section 311(f)(4) and (5) of the CWA, the authorized official shall prepare a Restoration Plan as provided in section 111(i) of CERCLA. If the measure of damages was determined in accordance with the guidance in § 11.81 of this part, the plan shall be based upon the Restoration Methodology Plan described in § 11.82 of this part. If the measure of damages was determined using any of the methodologies described in § 11.83 of this part, the plan shall describe how the monies will be used to address natural resources, specifically what restoration,

replacement, or acquisition of the equivalent resources will occur. The Restoration Plan shall be prepared in accordance with the guidance set forth in § 11.82 of this part.

(b) No restoration activities shall be conducted by Federal agencies that would incur ongoing expenses in excess of those that would have been incurred under baseline conditions and that cannot be funded by the amount included in the separate account established pursuant to § 11.92(a) of this part unless such additional monies are appropriated through the normal appropriations process.

(c) Modifications may be made to the Restoration Plan as become necessary as the restoration proceeds. Significant modifications shall be made available for review by any responsible party, any affected Federal or State agencies acting as trustees, and any other interested members of the public for a period of at least 30 days, with reasonable extensions granted as appropriate before tasks called for in the modified plan are begun.

#### Appendix I to Part 11—Methods for Estimating the Areas of Ground Water and Surface Water Exposure During the Preassessment Screen

This appendix provides methods for estimating, as required in § 11.25 of this part, the areas where exposure of ground water or surface water resources may have occurred or are likely to occur. These methods may be used in the absence of more complete information on the ground water or surface water resources.

##### Ground Water

The longitudinal path length (LPL) factors in table 1 are to be applied in estimating the area potentially exposed downgradient of the known limit of exposure or of the boundary of the site. Estimates of lateral path width (LPW) are to be used when the LPW exceeds the width of the plume as determined from available data, or when the width of the plume at the boundary of the site is estimated as less than the LPW. In the absence of data to the contrary, the largest values of LPL and LPW consistent with the geohydrologic data available shall be used to make the estimates required in the preassessment screen. An example computation using the LPL and LPW factors follows table 1.

Table 1—Factors for Estimation of Areas Potentially Exposed Via the Ground Water Pathway

Aquifer type	Hyd. conductivity/porosity factor (miles/year)	Hydraulic gradient estimate (feet/mile)	Time since release began (in years)	Longitudinal path length (in feet)	Lateral path width (in feet)
Sand.....	50	×	×	=	LPW = 0.2LPL
Sand + silt.....	0.5	×	×	=	LPW = 0.3LPL
Gravel.....	6000	×	×	=	LPW = 0.2LPL
Sandstone.....	0.01	×	×	=	LPW = 0.4LPL
Shale.....	$3 \times 10^{-6}$	×	×	=	LPW = 0.8LPL
Karst Limestone or Dolomite.....	10	×	×	=	LPW = 0.2LPL
Limestone or Dolomite.....	0.01	×	×	=	LPW = 0.4LPL
Fractured Crystalline Rocks.....	0.3	×	×	=	LPW = 0.3LPL
Dense Crystalline Rocks.....	$1 \times 10^{-5}$	×	×	=	LPW = 0.8LPL

#### Example of Computation for Estimating the Area Potentially Exposed via Ground Water Pathway

A release of hazardous substances occurs from a facility located in a glacial valley. Available data indicate the release may have occurred intermittently over a period of almost 1 year, although only one well about 300 feet downgradient of the facility boundary had detectable quantities of contaminants. The contaminated well is screened in the water table aquifer composed of gravelly sands. The facility boundary nearest the contaminated well is almost 3,000 feet in length, but a review of available data determined the release is probably localized along a 500-foot section of the boundary where a stream leaves the facility. Available water table data indicate hydraulic gradients in the valley range from 0.005 feet/mile up to 0.25 feet/mile near pumping wells. No pumping wells are known to be located near

the release, and a mean hydraulic gradient of 0.1 feet/mile is estimated in the vicinity of the release site. Using the gravel factor from table 1, the LPL and LPW are estimated:

$$6000 \times 0.1 \times 1 = 600 \text{ feet (LPL)}$$

$$\text{and}$$

$$600 \times 0.2 = 120 \text{ feet (LPW)}.$$

Since the estimated LPW (120 feet) is less than the plume width (500 feet) determined from other available data, the greater number is used to compute the area potentially exposed:

(1)  $600 \text{ feet} \times 500 \text{ feet} = 300,000 \text{ square feet}$  (about 6.9 acres). The available information allows an initial determination of area potentially exposed via the ground water pathway to be estimated:

(2)  $300 \text{ feet} \times 500 \text{ feet} = 150,000 \text{ square feet}$  (about 3.5 acres).

The total area potentially exposed is the sum of (1) and (2):  
 $6.9 + 3.5 = 10.4 \text{ acres}.$

#### Surface Water

The area of surface water resources potentially exposed should be estimated by applying the principles included in the examples provided below.

Example 1—A release occurs and most of the oil or hazardous substance enters a creek, stream, or river instantaneously or over a short time interval (pulse input is assumed). The maximum concentration at any downstream location, past the initial mixing distance, is estimated by:

$$C_p = 25(W_i)/(T^{0.7}Q)$$

where  $C_p$  is the peak concentration, in milligrams/liter (mg/L),

$W_i$  is the total reported (or estimated) weight of the undiluted substance released, in pounds,

$Q$  is the discharge of the creek, stream, or river, in cubic feet/second, and



T is the time, in hours, when the peak concentration is estimated to reach a downstream location L, in miles from the entry point.

The time T may be estimated from:

$$T = 1.5(L)/V_s$$

where T and L are defined as above and  $V_s$  is the mean stream velocity, in feet per second.

The mean stream velocity may be estimated from available discharge measurements or from estimates of slope of the water surface S (foot drop per foot distance downstream) and estimates of discharge Q (defined above) using the following equations:

for pool and riffle reaches  $V_s = 0.38(Q^{0.49})$  ( $S^{0.29}$ ), or

for channel-controlled reaches  $V_s = 2.69(Q^{0.29})$  ( $S^{0.29}$ ).

Estimates of S may be made from the slope of the channel, if necessary.

As the peak concentrations become attenuated by downstream transport, the plume containing the released substance

becomes elongated. The time the plume might take to pass a particular point downstream may be estimated using the following equation:

$$T_p = 9.25 \times 10^6 W_i / (QC_p)$$

where

$T_p$  is the time estimate, in hours, and  $W_i$ ,  $C_p$ , and Q are defined above.

Example 2—A release occurs and most of the oil or hazardous substance enters a creek, stream, or river very slowly or over a long time period (sustained input assumed). The maximum concentration at any downstream location, past the initial mixing distance, is estimated by:

$$C_p = C(q)/(Q + q)$$

where  $C_p$  and Q are defined above,

C is the average concentration of the released substance during the period of release, in mg/L, and

q is the discharge rate of the release into the streamflow, in cubic feet/second.

For the above computations, the initial mixing distance may be estimated by:

$$L_m = (1.7 \times 10^{-5}) V_s B^2 / (D^{1.5} S^{0.5})$$

where

$L_m$  is the initial mixing distance, in miles,

$V_s$  is defined above,

B is the average stream surface width, in ft,

D is the mean depth of the stream, in ft, and

S is the estimated water-surface slope, in ft/ft.

Example 3—A release occurs and the oil or hazardous substance enters a pond, lake, reservoir, or coastal body of water. The concentration of soluble released substance in the surface water body may be estimated by:

$$C_p = CV_c / (V_w + V_c)$$

where

$C_p$  and C are defined above,

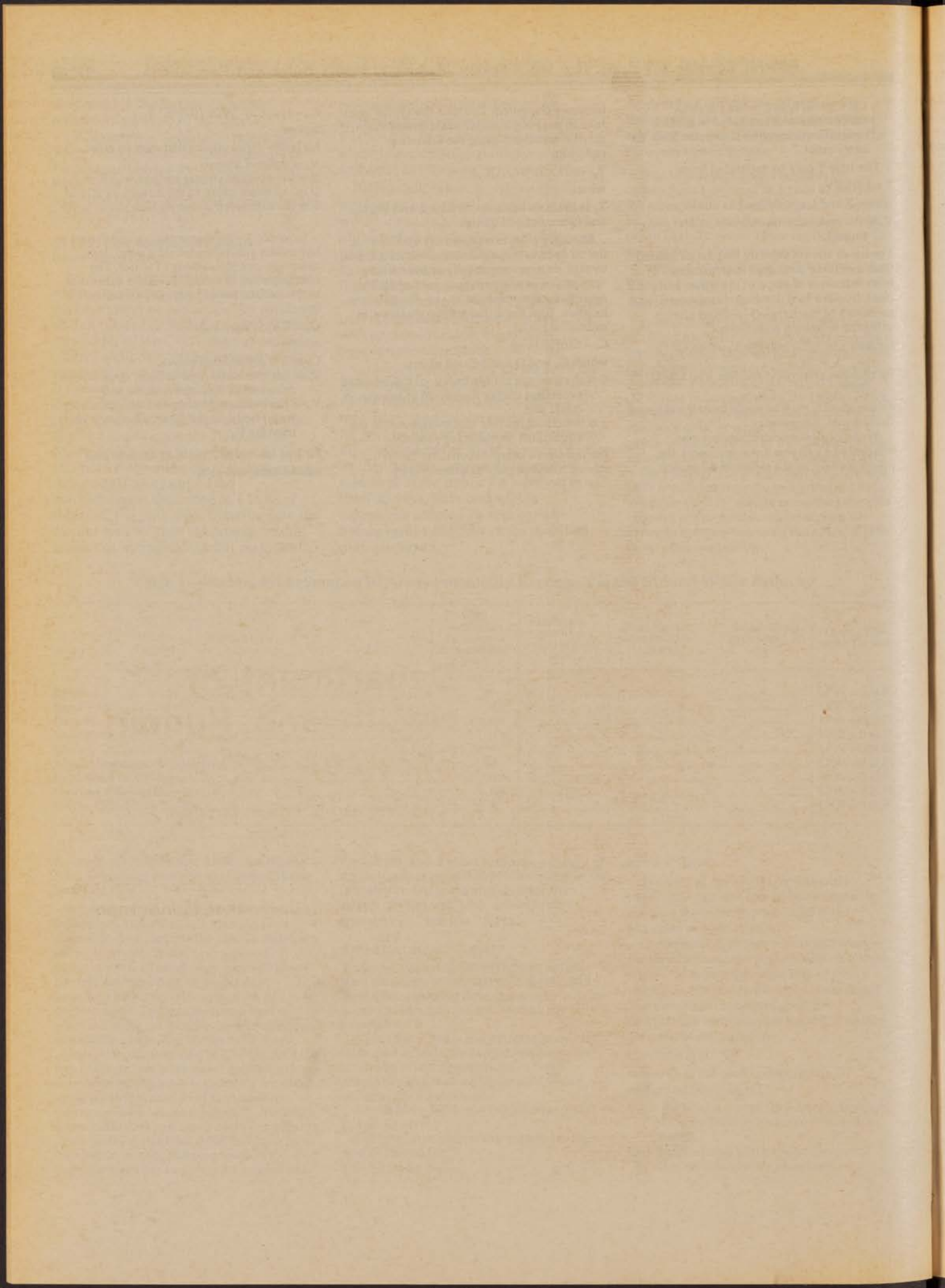
$V_c$  is the estimated total volume of substance released, in volumetric units, and

$V_w$  is the estimated volume of the surface water body, in the same volumetric units used for  $V_c$ .

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# Final Report to Congress on the Safety of Over-the-Counter Drugs

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Friday  
August 1, 1986

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## Part IV

### Department of Health and Human Services

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Food and Drug Administration

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21 CFR Parts 357 and 369

Anthelmintic Drug Products for Over-the-Counter Human Use; Final Monograph



# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

### 21 CFR Parts 357 and 369

[Docket No. 79N-0378]

#### Anthelmintic Drug Products for Over-The-Counter Human Use; Final Monograph

**AGENCY:** Food and Drug Administration.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing a final rule in the form of a final monograph establishing conditions under which over-the-counter (OTC) anthelmintic drug products (products that destroy pinworms) are generally recognized as safe and effective and not misbranded. FDA is issuing this final rule after considering public comments on the agency's proposed regulation, which was issued in the form of a tentative final monograph, and all new data and information on anthelmintic drug products that have come to the agency's attention. This final monograph is part of the ongoing review of OTC drug products conducted by FDA.

**EFFECTIVE DATE:** February 2, 1987. For additional information concerning this effective date see "Paperwork Reduction Act of 1980" appearing in the preamble of this document.

**FOR FURTHER INFORMATION CONTACT:** William E. Gilbertson, Center for Drugs and Biologics (HFN-210), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8000.

**SUPPLEMENTARY INFORMATION:** In the Federal Register of September 9, 1980 (45 FR 59540), FDA published, under § 330.10(a)(6) (21 CFR 330.10(a)(6)), an advance notice of proposed rulemaking to establish a monograph for OTC anthelmintic drug products, together with the recommendations of the Advisory Review Panel on OTC Miscellaneous Internal Drug Products, which was the advisory review panel responsible for evaluating data on the active ingredients in this drug class. Interested persons were invited to submit comments by December 8, 1980. Reply comments in response to comments filed in the initial comment period could be submitted by January 7, 1981.

In accordance with § 330.10(a)(10), the data and information considered by the Panel were put on public display in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD

20857, after deletion of a small amount of trade secret information.

The agency's proposed regulation, in the form of a tentative final monograph, for anthelmintic drug products was published in the Federal Register of August 24, 1982 (47 FR 37062). Interested persons were invited to file by October 25, 1982, written comments, objections, or requests for oral hearing before the Commissioner of Food and Drugs regarding the proposal. Interested persons were invited to file comments on the agency's economic impact determination by December 22, 1982. Final agency action occurs with the publication of this final monograph, which is a final rule establishing a monograph for OTC anthelmintic drug products.

The OTC procedural regulations (21 CFR 330.10) now provide that any testing necessary to resolve the safety or effectiveness issues that formerly resulted in a Category III classification, and submission to FDA of the results of that testing or any other data, must be done during the OTC drug rulemaking process before the establishment of a final monograph. Accordingly, FDA is no longer using the terms "Category I" (generally recognized as safe and effective and not misbranded), "Category II" (not generally recognized as safe and effective or misbranded), and "Category III" (available data are insufficient to classify as safe and effective, and further testing is required) at the final monograph stage, but is using instead the terms "monograph conditions" (old Category I) and "nonmonograph conditions" (old Categories II and III).

As discussed in the proposed regulation for OTC anthelmintic drug products (47 FR 37062), the agency advises that the conditions under which the drug products that are subject to this monograph will be generally recognized as safe and effective and not misbranded (monograph conditions) will be effective 6 months after the date of publication in the Federal Register. Therefore, on or after February 2, 1987, no OTC drug product that is subject to the monograph and that contains a nonmonograph condition, i.e., a condition that would cause the drug to be not generally recognized as safe and effective or to be misbranded, may be initially introduced or initially delivered for introduction into interstate commerce unless it is the subject of an approved application. Further, any OTC drug product subject to this monograph that is repackaged or relabeled after the effective date of the monograph must be in compliance with the monograph regardless of the date the product was

initially introduced or initially delivered for introduction into interstate commerce. Manufacturers are encouraged to comply voluntarily with the monograph at the earliest possible date.

In response to the proposed rule on OTC anthelmintic drug products, a bi-State drug information center, a pediatric association, a consumer, and a physician submitted comments. Several additional comments were received after the close of the comment period from a county department of health services, a university medical center, and three physicians. The issues raised by these comments are the same as those raised by comments submitted during the period the administrative record was open. Copies of the comments received are on public display in the Dockets Management Branch.

All "OTC Volumes" cited throughout this document refer to the submissions made by interested persons pursuant to the call-for-data notices published in the Federal Register of November 16, 1973 (38 FR 31696) and August 27, 1975 (40 FR 38179) or the additional information that has come to the agency's attention since publication of the notice of proposed rulemaking. The volumes are on public display in the Dockets Management Branch.

#### I. The Agency's Conclusions of the Comments

1. Two comments disagreed with the agency's proposed substitution of the word "doctor" for the "physician" in OTC drug labeling. One comment stated that because "physician" is a term that is recognized by people of all ages and social and economic levels, there is no need for the change, which would be costly and provide no benefit. The comment further contended that physician is a more accurate term, whereas "doctor" is a broad term that could confuse and mislead the lay person into taking advice on medication from persons other than medical doctors, such as optometrists, podiatrists, and chiropractors.

The agency recognizes that the term "doctor" is not a precise synonym for the word "physician," but believes that the terms are frequently used interchangeably by consumers and that the word "doctor" is likely to be more commonly used and better understood by consumers. In an effort to simplify OTC drug labeling, the agency proposed in a number of tentative final monographs to substitute the word "doctor" for "physician" in OTC drug monographs. Based on comments



received on these proposals, the agency has determined that final monographs and any applicable OTC drug regulation will give manufacturers the option of using either the word "physician" or the word "doctor". This final monograph provides that option.

2. Several comments objected to the agency's proposed switch of pyrantel pamoate from prescription to OTC status, arguing that there is a large potential for widespread inappropriate use because the average person is incapable of diagnosing pinworm infestations, and proper diagnosis requires laboratory confirmation. One comment stated that symptoms are not specific in pinworm infestations, and another comment added that parents could incorrectly attribute nonspecific gastrointestinal and other symptoms to worms when the symptomatology may be due to causes other than pinworm infestation.

The agency does not agree that consumers are unable to diagnose pinworm infestations and that reclassification of pyrantel pamoate from prescription to OTC status would result in widespread inappropriate use. As one comment pointed out, the best known symptom of pinworm infestation is pruritis ani (itching in the anal area). Secondary conditions that also occur in pinworm infestation include insomnia, gastrointestinal distress, irritability, enuresis (bedwetting), and secondary infection due to localized scratching. The agency agrees that these symptoms are suggestive of pinworm infestation but are not limited to that condition. When these symptoms occur, the labeling of an OTC anthelmintic drug product will inform consumers having such symptoms that they may have pinworms and will instruct them to make a visual inspection for the worms before using the product.

The agency recognizes that laboratory diagnosis would be required to confirm pinworm eggs, but consumer diagnosis can be made by visual detection of the adult female worm (usually  $\frac{1}{4}$  to  $\frac{1}{2}$  inch in length) during the hours of sleep when the worm migrates out of the anus onto the perianal skin. In addition, OTC anthelmintic drug products will not be indicated for the symptoms of pruritis ani, gastrointestinal distress, etc., but instead will be labeled only for the treatment of pinworms. Should a consumer suspect pinworms, the labeling will provide sufficient information on the symptoms, identification, and detection of pinworms to allow consumers to use the product properly.

The comments did not present, and the agency is unaware of, any evidence

that drugs previously marketed OTC for pinworm treatment have been inappropriately used. Likewise, the comments did not present, and the agency is unaware of, any evidence that the OTC availability of pyrantel pamoate will result in misuse of the drug. However, because pyrantel pamoate is a single-dose (one time) medication and should not be repeated without consulting a doctor, the agency is amending the directions for use in § 357.150(d)(2) by adding the following: "Medication should only be taken one time as a single dose; do not repeat treatment unless directed by a doctor," and "If any symptoms of pinworms are still present after treatment, consult a doctor."

3. Several comments argued that pyrantel pamoate is not safe for OTC use because of the side effects sometimes associated with use of the drug. The comments further contended that the lay person cannot differentiate between the side effects that might occur with use of the drug and potentially serious pathologic conditions. One comment stated that pyrantel pamoate-related increases in serum glutamic-oxaloacetic transaminase (SGOT) occurred in 0 to 4 percent of individuals who took the drug and included three references purporting to show that the incidence of side effects after taking pyrantel pamoate varied from 0 to 20 percent, depending on geographic area and observer (Refs. 1, 2, and 3). The comment also included a report alleging that pyrantel pamoate was responsible for causing two deaths in Egypt (Ref. 4).

The agency has reviewed the references included by the comment and other available data and believes that they do not support the contention that the drug pyrantel pamoate is unsafe for OTC use because of the side effects which might occur with use of the drug. In fact, the references (Refs. 1, 2, and 3) suggest the pyrantel pamoate is a safe and effective single-dose anthelmintic with a low incidence of side effects. Additionally, the agency notes that when side effects do occur (i.e., abdominal cramps, nausea, vomiting, or diarrhea, and, less frequently, headaches and dizziness) they are mild and transient. Therefore, the agency believes the concern over side effects can be adequately handled through the OTC drug labeling. The agency is expanding the monograph warnings to include the side effects most frequently mentioned in the references, as follows: "Abdominal cramps, nausea, vomiting, diarrhea, headache, or dizziness sometimes occur after taking this drug. If any of these conditions persist, consult a

doctor." The agency recognizes that the lay person cannot differentiate between side effects that might occur with the use of pyrantel pamoate, or any other OTC drug, and serious pathologic conditions. However, in view of the fact that pyrantel pamoate is a single-dose medication, the agency believes it is sufficient for the labeling of the product to advise consumers to consult a doctor if side effects persist or become bothersome.

Although no significant changes in or impairment to hepatic function attributable to the use of pyrantel pamoate have been reported, the agency proposed in the tentative final monograph (47 FR 37064) to include a warning against the use of pyrantel pamoate in patients with preexisting liver disease because minor transient elevations of SGOT have occurred, as the comment pointed out, in a small percentage of patients. The agency reaffirms that decision by including the warning in this final rule.

The agency notes that the Panel was aware of, reviewed, and evaluated the information available to it regarding the incident in Egypt (Refs. 5 and 6) and concluded that the deaths were not due to pyrantel pamoate (45 FR 59546). The agency concurs with the Panel's findings that pyrantel pamoate can be generally recognized as safe for OTC use as an anthelmintic.

#### References

- (1) Gilles, H. M., "Diseases of the Alimentary System—Treatment of Intestinal Worms," *British Medical Journal*, 2:1314-1315, 1977.
- (2) Piekarski, G., "Die Askariasis (Spulwurmbefall)," *Deutsche Medizinische Wochenschrift*, 105:1406-1408, 1980.
- (3) Stahel E., "Therapie der Darmparasitosen," *Deutsche Medizinische Wochenschrift*, 102:133-135, 1977.
- (4) Comment No. C00003, Docket No. 79N-0378, Dockets Management Branch.
- (5) OTC volume 170180, Docket No. 79N-0378, Dockets Management Branch.
- (6) OTC volume 170182, Docket No. 79N-0378, Dockets Management Branch.

4. One comment objected to the OTC availability of pyrantel pamoate because its safety has not been demonstrated for use by pregnant women.

The agency recognizes that there are no data demonstrating that pyrantel pamoate is safe for use by pregnant women. Conversely, as stated in the tentative final monograph (47 FR 37064), there are no data available demonstrating that pyrantel pamoate is unsafe for use by pregnant women. The directions for use for treating pinworms state that when one individual in a



household has pinworms, the entire household should be treated unless otherwise advised. In the case of a pregnant woman, the agency believes that the decision to use an anthelmintic drug product would best be made through consultation with a doctor and, therefore, has included the following warning in the proposed liver disease warning: "If you are pregnant or have liver disease, do not take this product unless directed by a doctor."

5. Two comments stated that determination of the required dose of pyrantel pamoate based on the weight of the patient could be confusing to the lay person.

Because the agency shares the concern expressed by the comments, it concluded in the tentative final monograph that the dosage information for pyrantel pamoate must be provided to consumers with directions that are easily understood (47 FR 37064). The agency provided a dosage schedule and proposed that the label should state the quantity of drug (liquid measurement or the number of dosage units) to be taken for varying body weights. The dosage chart is further clarified in this final monograph to include weight ranges.

6. One comment stated that none of the Panel members was knowledgeable in the field of medical parasitology and that expertise in this field was essential to the development of the Panel's report on OTC anthelmintic drug products.

Although the Miscellaneous Internal Drug Products Panel did not include a medical parasitologist, experts in the fields of parasitology and pediatrics appeared before the Panel to express their views and present data for the Panel's consideration. Additionally, data submitted to the Panel were reviewed by three pediatricians knowledgeable in the diagnosis and treatment of pinworms (Ref. 1). Thus the Panel was not denied expertise in these areas in developing its report.

The agency points out that data on which the Panel based its conclusions, including published and unpublished references, are available to interested persons through the Dockets Management Branch (address above).

#### Reference

(1) Summary Minutes of the OTC Panel on Miscellaneous Internal Drug Products, Ninth Meeting, March 7-8, 1976, Docket No. 79N-0378, Dockets Management Branch.

7. The directions for use for pyrantel pamoate in proposed § 357.150(d)(2) stated that when one individual in a household has pinworms, the entire household should be treated. To avoid a contradiction between this statement and the warnings which advise persons

who are pregnant or have liver disease not to take the drug unless directed by a doctor, the agency has revised the directions statement to read as follows: "When one individual in a household has pinworms, the entire household should be treated unless otherwise advised. See Warnings."

#### II. The Agency's Final Conclusions on OTC Anthelmintic Drug Products

Based on the available evidence, the agency is issuing a final monograph establishing conditions under which OTC anthelmintic drug products are generally recognized as safe and effective and not misbranded. Specifically, the agency has determined that the only monograph ingredient is pyrantel pamoate. All other ingredients, including gentian violet and piperazine citrate, are considered nonmonograph ingredients. Hexylresorcinol, which was not submitted for review by the Panel or the agency, but which has been the subject of a recommended warning in § 369.20, is also a nonmonograph ingredient. Any drug product marketed for use as an OTC anthelmintic that is not in conformance with the monograph (21 CFR Part 357, Subpart B) will be considered a new drug within the meaning of section 201(p) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(p)) and may not be marketed for this use unless it is the subject of an approved new drug application. Accordingly, the agency is removing from § 369.20 the entry "GENTIAN VIOLET (METHYLOSANILINE) TABLETS" and its caution statement; and the entry "HEXYLRESORCINOL ANTHELMINTICS" and its warning statement.

In the Federal Register of April 22, 1985 (50 FR 15810), the agency proposed to change its "exclusivity" policy for the labeling of OTC drug products that has existed during the course of the OTC drug review. Under that policy, the agency had maintained that the terms used in an OTC drug product's labeling were limited to those terms included in a final OTC drug monograph.

In the Federal Register of May 1, 1986 (51 FR 16258), the agency published a final rule changing the exclusivity policy and establishing three alternatives for stating the indications for use in OTC drug labeling. Under the final rule, the label and labeling of OTC drug products are required to contain in a prominent and conspicuous location, either (1) the specific wording on indications for use established under an OTC drug monograph, which may appear within a boxed area designated "APPROVED USES"; (2) other wording describing such indications for use that meets the

statutory prohibitions against false or misleading labeling, which shall neither appear within a boxed area nor be designated "APPROVED USES"; or (3) the approved monograph language on indications, which may appear within a boxed area designated "APPROVED USES," plus alternative language describing indications for use that is not false or misleading, which shall appear elsewhere in the labeling. All required OTC drug labeling other than indications for use (e.g., statement of identity, warnings, and directions) must appear in the specific wording established under an OTC drug monograph. The final rule in this document is subject to the final rule revising the exclusivity policy.

No comments were received in response to the agency's request for specific comment on the economic impact of this rulemaking (47 FR 37065). The agency has examined the economic consequences of this final rule in conjunction with other rules resulting from the OTC drug review. In a notice published in the Federal Register of February 8, 1983 (48 FR 5806), the agency announced the availability of an assessment of these economic impacts. The assessment determined that the combined impacts of all the rules resulting from the OTC drug review do not constitute a major rule according to the criteria established by Executive Order 12291. The agency therefore concludes that no one of these rules, including this final rule for OTC anthelmintic drug products, is a major rule.

The economic assessment also concluded that the overall OTC drug review was not likely to have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Public Law 96-354. That assessment included a discretionary Regulatory Flexibility Analysis in the event that an individual rule might impose an unusual or disproportionate impact on small entities. However, this particular rulemaking for OTC anthelmintic drug products is not expected to pose such an impact on small businesses. Therefore, the agency certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

#### Paperwork Reduction Act of 1980

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the collection of information requirement in § 357.152 in this regulation will be submitted for approval to the Office of Management



and Budget (OMB). This requirement will not be effective until FDA obtains OMB approval. FDA will publish a notice concerning OMB approval of this requirement in the **Federal Register** prior to February 2, 1987. Any comments on this provision should be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Rm. 3002, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer for FDA.

#### List of Subjects

##### 21 CFR Part 357

OTC drugs, Anthelmintic drug products, Cholecystokinetic drug products.

##### 21 CFR Part 369

Labeling, OTC drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Administrative Procedure Act, Subchapter D of Chapter I of Title 21 of the Code of Federal Regulations is amended as follows:

#### PART 357—MISCELLANEOUS INTERNAL DRUG PRODUCTS FOR OVER-THE-COUNTER HUMAN USE

1. In Part 357 by adding new Subpart B to read as follows:

##### Subpart B—Anthelmintic Drug Products

Sec.

357.101 Scope.

357.103 Definition.

357.110 Anthelmintic active ingredient.

357.150 Labeling of anthelmintic drug products.

357.152 Package inserts for anthelmintic drug products.

357.180 Professional labeling.

Authority: Secs. 201(p), 502, 505, 701, 52 Stat. 1041-1042 as amended, 1050-1053 as amended, 1055-1056 as amended by 70 Stat. 919 and 72 Stat. 948 (21 U.S.C. 321(p), 352, 355, 371); 5 U.S.C. 553; 21 CFR 5.11.

##### Subpart B—Anthelmintic Drug Products

##### § 357.101 Scope.

(a) An over-the-counter anthelmintic drug product in a form suitable for oral administration is generally recognized as safe and effective and is not misbranded if it meets each condition in this subpart and each general condition established in § 330.1.

(b) References in this subpart to regulatory sections of the Code of Federal Regulations are to Chapter I of Title 21 unless otherwise noted.

##### § 357.103 Definition.

As used in this subpart:

**Anthelmintic.** An agent that is destructive to worms.

##### § 357.110 Anthelmintic active ingredient.

The active ingredient of the product is pyrantel pamoate when used within the dosage limits established in

§ 357.150(d)(1).

##### § 357.150 Labeling of anthelmintic drug products.

(a) **Statement of identity.** The labeling of the product contains the established name of the drug, if any, and identifies the product as a "pinworm treatment."

(b) **Indication.** The labeling of the product states, under the heading "Indication," the following: "For the treatment of pinworms." Other truthful and nonmisleading statements, describing only the indications for use that have been established and listed above, may also be used, as provided in § 330.1(c)(2), subject to the provisions of section 502 of the act relating to misbranding and the prohibition in section 301(d) of the act against the introduction or delivery for introduction into interstate commerce of unapproved new drugs in violation of section 505(a) of the act.

(c) **Warnings.** The labeling of the product contains the following warnings under the heading "Warnings":

(1) "Abdominal cramps, nausea, vomiting, diarrhea, headache, or dizziness sometimes occur after taking this drug. If any of these conditions persist consult a doctor."

(2) "If you are pregnant or have liver disease, do not take this product unless directed by a doctor."

(d) **Directions.** The labeling of the product contains the following information under the heading "Directions":

(1) Adults and children 2 years to under 12 years of age: oral dosage is a single dose of 5 milligrams of pyrantel base per pound, or 11 milligrams per kilogram, of body weight not to exceed 1 gram. Dosing information should be converted to easily understood directions for the consumer using the following dosage schedule:

Weight	Dosage (taken as a single dose) <sup>1</sup>
Less than 25 pounds or under 2 years old.	Do not use unless directed by a doctor.
25 to 37 pounds	125 milligrams.
38 to 62 pounds	250 milligrams.
63 to 87 pounds	375 milligrams.
88 to 112 pounds	500 milligrams.
113 to 137 pounds	625 milligrams.
138 to 162 pounds	750 milligrams.
163 to 187 pounds	875 milligrams.
188 pounds and over	1,000 milligrams.

<sup>1</sup> Depending on the product, the label should state the quantity of drug as a liquid measurement (e.g., teaspoonful) or as the number of dosage units (e.g., tablets) to be taken for the varying body weights. (If appropriate, it is recommended that a measuring cup graduated by body weight and/or liquid measurement be provided with the product.) Manufacturers should present this information as appropriate for their product and may vary the format of this chart as necessary.

(2) "Read package insert carefully before taking this medication. Take only according to directions and do not exceed the recommended dosage unless directed by a doctor. Medication should only be taken on time as a single dose; do not repeat treatment unless directed by a doctor. When one individual in a household has pinworms, the entire household should be treated unless otherwise advised. See Warnings. If any worms other than pinworms are present before or after treatment, consult a doctor. If any symptoms or pinworms are still present after treatment, consult a doctor."

(3) "This product can be taken any time of day, with or without meals. It may be taken alone or with milk or fruit juice. Use of a laxative is not necessary prior to, during, or after medication."

(e) **Optional wording.** The word "physician" may be substituted for the word "doctor" in any of the labeling statements in this section.

##### § 357.152 Package inserts for anthelmintic drug products.

The labeling of the product contains a consumer package insert which includes the following information:

(a) A discussion of the symptoms suggestive of pinworm infestation, including a statement that pinworms must be visually identified before taking this medication.

(b) A detailed description of how to find and identify the pinworm.

(c) A commentary on the life cycle of the pinworm.

(d) A commentary on the ways in which pinworms may be spread from person to person and hygienic procedures to follow to avoid such spreading.

(e) The appropriate labeling information contained in § 357.150

##### § 357.180 Professional labeling.

The labeling provided to health professionals (but not to the general public) may contain an additional indication: "For the treatment of common roundworm infestation."

#### PART 396—INTERPRETATIVE STATEMENTS RE WARNINGS ON DRUGS AND DEVICES FOR OVER-THE-COUNTER SALE

2. The authority citation for 21 CFR Part 369 is revised to read as follows:

Authority: Secs. 502, 503, 506, 507, 701, 52 Stat. 1050-1052 as amended, 55 Stat. 851, 59 Stat. 463 as amended, 52 Stat. 1055-1056 as amended (21 U.S.C. 352, 353, 356, 357, 371); 21 CFR 5.11.



## § 369.20 [Amended]

3. In § 369.20 *Drugs; recommended warnings and caution statements* by removing the entry "GENTIAN VIOLET (METHYLROSANILINE CHLORIDE) TABLETS" and its caution statement and by removing the entry "HEXYLRESORCINOL ANTHELMINTICS" and its warnings statement.

Dated: May 3, 1986.

Frank E. Young,

*Commissioner of Food and Drugs.*

[FR Doc. 86-17180 Filed 7-31-86; 8:45 am]

BILLING CODE 4160-01-M



# First Report

Friday  
August 1, 1986

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## Part V

### Department of Health and Human Services

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#### Food and Drug Administration

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#### Antacid and Antiflatulent Drug Products for Over-the-Counter Human Use; Amendment of the Monographs



**DEPARTMENT OF HEALTH AND HUMAN SERVICES****21 CFR Parts 331 and 332****[Docket No. 85N-0093]****Antacid and Antiflatulent Drug Products for Over-the-Counter Human Use; Amendment of the Monographs****AGENCY:** Food and Drug Administration.**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is issuing a final rule to amend the monographs for over-the-counter (OTC) antacid and antiflatulent drug products by adding new sections that will exempt certain antacid, antiflatulent, and antacid/antiflatulent combination drug products from that part of the accidental overdose warning required by § 330.1(g) (21 CFR 330.1(g)) that states, "In case of accidental overdose, seek professional assistance or contact a poison control center immediately." The exemption from the warning above is being provided because certain antacid and antiflatulent active ingredients contained in OTC drug products have been determined to have a low potential for acute toxicity resulting from accidental ingestion. FDA is issuing this final rule after considering public comment on the agency's proposed regulation and all new data and information on OTC antacid and antiflatulent drug products that have come to the agency's attention. This final rule is part of the ongoing review of OTC drug products conducted by FDA.

**EFFECTIVE DATE:** August 1, 1986.

**FOR FURTHER INFORMATION CONTACT:** William E. Gilbertson, Center for Drugs and Biologics (HFN-210), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8000.

**SUPPLEMENTARY INFORMATION:** In the Federal Register of June 4, 1974 (39 FR 19862), FDA issued a final monograph for OTC antacid drug products (21 CFR Part 331) and a final monograph for OTC antiflatulent drug products (21 CFR Part 332) that established conditions under which these drug products are generally recognized as safe and effective and not misbranded. At that time, FDA exempted sodium bicarbonate powder from the general accidental overdose warning required by § 330.1(g) (39 FR 19867). Since publication of the antacid final monograph, a number of firms have petitioned for an exemption from the general overdose warning required on the labeling of antacid, antiflatulent, and antacid/antiflatulent combination drug products.

In the Federal Register of April 13, 1984 (49 FR 14908), FDA issued a notice of proposed rulemaking to exempt certain antacid, antiflatulent, and antacid/antiflatulent combination drug products from the accidental overdose warning statement required by § 330.1(g), i.e., "In case of accidental overdose, seek professional assistance or contact a poison control center immediately." FDA proposed this exemption from the warning because certain antacid and antiflatulent active ingredients in OTC drug products have been demonstrated to have a low potential for acute toxicity resulting from accidental ingestion. The labeling of products containing these ingredients would continue to contain the first part of the warning required by § 330.1(g) which states, "Keep this and all drugs out of the reach of children." This requirement would have applied to sodium bicarbonate as well as to other antacid and antiflatulent drug products.

Interested persons were invited to file by June 12, 1984, written comments regarding the proposal. Interested persons were invited to file comments on the agency's economic impact determination by August 13, 1984. Final agency action occurs with the publication of this final rule.

In response to the proposed rule, one manufacturer of sodium bicarbonate products submitted a comment. Copies of the comment received are on public display in the Dockets Management Branch.

The comment objected to the proposed rule because it appears to take away an exemption from the requirements of § 330.1(g) that is currently allowed for products containing sodium bicarbonate. The comment stated that the antacid final rule published in the Federal Register of June 4, 1974 (39 FR 19867) provided an exemption to sodium bicarbonate from the labeling requirements of § 330.1(g), and that the exemption applies to both the "keep out of reach of children" and the accidental overdose portions of the warning. The comment objected that the proposed rule would remove the existing exemption which sodium bicarbonate has from the "keep out of reach of children" statement without following necessary administrative procedures. The comment argued that there is no factual need for the "keep out of reach of children" warning on sodium bicarbonate products because there have been no instances of a child voluntarily ingesting these products and becoming ill even though the products have been promoted for uses directly involving children. The comment also argued that requiring the warning on

sodium bicarbonate products could undermine the effectiveness of warning statements on other products because consumers know that sodium bicarbonate is safe and would ignore the warning and may assume that other product warnings in general are also unjustified and unimportant. The comment concluded that it had no objection to FDA's stated purpose for the proposed rule, but requested that FDA remove the implied revocation of the exemption for sodium bicarbonate products from having to bear the warning "Keep this and all drugs out of the reach of children."

After considering the comment's arguments, the agency agrees that sodium bicarbonate powder, when packaged and promoted primarily for other than drug uses, e.g., baking ingredient, refrigerator deodorant, household cleanser, etc., does not pose a threat to small children. The inclusion of the "keep out of reach of children" warning on such products would be unnecessary and may be unduly alarming to consumers who have routinely used these products around children. Therefore, the agency concludes that sodium bicarbonate products, in powder form and intended primarily for other than drug uses, may be exempt from both the "keep out of reach of children" and the accidental overdose warnings required by § 330.1(g). However, because the agency believes it is generally best to keep any drug product out of the reach of children, regardless of its potential for causing acute toxicity, the labeling of sodium bicarbonate products marketed primarily as a drug and all other antacid and antiflatulent drug products must continue to contain the first part of the warning which states "Keep this and all drugs out of the reach of children."

Accordingly, the agency is adding new §§ 331.30(g) and 332.30(c) that will exempt antacid drug products identified in § 331.11(a), (b), and (d) through (m) and antiflatulent drug products identified in § 332.10 or any allowable combination of these ingredients to be exempt from the general overdose warning requirement in § 330.1(g). With the exception of sodium bicarbonate when marketed in a powder form and intended primarily for other than drug uses, the labeling of OTC antacid and antiflatulent drug products containing these ingredients must continue to contain the first part of the warning which states, "Keep this and all drugs out of the reach of children." Because no new data were submitted regarding the toxicity of bismuth compounds, the labeling of products containing these



ingredients, identified in § 331.11(c), must continue to bear both warnings required by § 330.1(g).

Because this final rule relates only to warnings for OTC antacid and antitflatulent drug products, the changes in the "exclusivity" policy that were recently published in the *Federal Register* of May 1, 1986 (51 FR 16258) do not apply to this document.

One comment was submitted in response to the agency's request for specific comment on the economic impact of this rulemaking (49 FR 14909). The comment argued that marketers of sodium bicarbonate products would suffer unjustifiable, irreparable economic harm if sodium bicarbonate products were required to bear the "keep out of reach of children" statement because the statement would deter consumers from purchasing the product for use as a refrigerator deodorant, baking ingredient, etc. Because this final rule exempts powder forms of sodium bicarbonate intended primarily for other than drug uses from the "keep out of reach of children" statement, the comment's concern is moot. The agency has examined the economic consequences of this final rule in conjunction with other rules resulting from the OTC drug review. In a notice published in the *Federal Register* of February 8, 1983 (48 FR 5806), the agency announced the availability of an assessment of these economic impacts. The assessment determined that the combined impacts of all the rules resulting from the OTC drug review do not constitute a major rule according to the criteria established by Executive Order 12291. The agency therefore concludes that no one of these rules, including this final rule for OTC antacid and antitflatulent drug products, is a major rule.

The economic assessment also concluded that the overall OTC drug review was not likely to have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Public Law 96-354. That assessment included a discretionary Regulatory Flexibility Analysis in the event that an individual rule might impose an unusual or disproportionate impact on small entities. However, this particular rulemaking for OTC antacid and antitflatulent drug products is not

expected to pose such an impact on small businesses. Therefore, the agency certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects

##### 21 CFR Part 331

Labeling, OTC drugs, Antacid drug products.

##### 21 CFR Part 332

Labeling, OTC drugs, Antitflatulent drug products.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Administrative Procedure Act, Subchapter D of Chapter I of Title 21 of the Code of Federal Regulations is amended in Parts 331 and 332 as follows:

#### PART 331—ANTACID PRODUCTS FOR OVER-THE-COUNTER (OTC) HUMAN USE

1. The authority citation for 21 CFR Part 331 continues to read as follows:

Authority: Secs. 201(p), 502, 505, 701, 52 Stat. 1041-1042 as amended, 1050-1053 as amended, 1055-1056 as amended by 70 Stat. 919 and 72 Stat. 948 (21 U.S.C. 321(p), 352, 355, 371); 5 U.S.C. 553; 21 CFR 5.11.

##### § 331.11 [Amended]

2. In Part 331, § 331.11 *Listing of specific active ingredients* is amended in paragraph (k)(1) by revising the last sentence to read:

\* \* \* \* \*

(k) \* \* \*

(1) \* \* \* That part of the warning required by § 330.1(g), which states, "Keep this and all drugs out of the reach of children" is not required on a product which contains only sodium bicarbonate powder and which is intended primarily for other than drug uses.

3. In Part 331, § 331.30 is amended by adding new paragraph (g) to read as follows:

##### § 331.30 Labeling of antacid products.

\* \* \* \* \*

(g) *Exemption from the general accidental overdose warning.* The labeling for antacid drug products containing the active ingredients identified in § 331.11(a), (b), and (d) through (m); permitted combinations of these ingredients provided for in

§ 331.10; and any of these ingredients or combinations of these ingredients in combination with simethicone (identified in § 332.10 of this chapter and provided for in § 331.15(c)), are exempt from the requirement in § 300.1(g) of this chapter that the labeling bear the general warning statement "In case of accidental overdose, seek professional assistance or contact a poison control center immediately." With the exception of sodium bicarbonate powder products identified in § 331.11(k)(1), the labeling must continue to bear the first part of the general warning in § 330.1(g) of this chapter, which states, "Keep this and all drugs out of the reach of children."

#### PART 332—ANTIFLATULENT PRODUCTS FOR OVER-THE-COUNTER HUMAN USE

4. The authority citation for 21 CFR Part 332 continues to read as follows:

Authority: Secs. 201(p), 502, 505, 701, 52 Stat. 1041-1042 as amended, 1050-1053 as amended, 1055-1056 as amended by 70 Stat. 919 and 72 Stat. 948 (21 U.S.C. 321(p), 352, 355, 371); 5 U.S.C. 553; 21 CFR 5.11.

5. In Part 332, § 332.30 is amended by adding new paragraph (c) to read as follows:

##### § 332.30 Labeling of antitflatulent products.

\* \* \* \* \*

(c) *Exemption from the general accidental overdose warning.* The labeling for antitflatulent drug products containing simethicone identified in § 332.10 and antacid/antitflatulent combination drug products provided for in § 332.15, containing the active ingredients identified in § 331.11(a), (b), and (d) through (m) of this chapter are exempt from the requirement in § 330.1(g) of this chapter that the labeling bear the general warning statement "In case of accidental overdose, seek professional assistance or contact a poison control center immediately." The labeling must continue to bear the first part of the general warning in § 330.1(g) of this chapter, which states, "Keep this and all drugs out of the reach of children."

Dated: May 3, 1986.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 86-17181 Filed 7-31-86; 8:45 am]

BILLING CODE 4160-01-M







# Federal Register

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Friday  
August 1, 1986

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## Part VI

### Department of Education

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Availability of Grants for Experimental  
and Innovative Training Program; Notice



**DEPARTMENT OF EDUCATION****Office of Special Education and Rehabilitative Services****Experimental and Innovative Training Program; Availability of Grants**

**AGENCY:** Department of Education.

**ACTION:** Notice of final funding priority for fiscal year 1986.

**SUMMARY:** The Secretary announces an annual funding priority for training grants under the Experimental and Innovative Training Program in order to ensure effective use of program funds and to direct funds to an area of identified personnel need during fiscal year 1986. The Secretary will give an absolute preference to applications that meet the terms of the priority.

**EFFECTIVE DATE:** This final annual funding priority takes effect either 45 days after publication in the *Federal Register* or later if Congress takes certain adjournments. If you want to know the effective date of this final annual funding priority, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:**

Delores L. Watkins, Division of Resource Development, Rehabilitation Services Administration, U.S. Department of Education, 400 Maryland Avenue, SW., (Room 3324-M/S 2312, Mary E. Switzer Building), Washington, D.C. 20202. Telephone: (202) 732-1332.

**SUPPLEMENTARY INFORMATION:** Grants for the Experimental and Innovative Training Program are authorized by Title III, section 304 of the Rehabilitation Act of 1973, as amended. Program regulations for the Experimental and Innovative Training Program are established at 34 CFR Part 387. The purpose of the Experimental and Innovative Training Program is to support projects designed to develop new types of rehabilitation personnel and to demonstrate the effectiveness of these new types of personnel in providing rehabilitation services to severely handicapped persons and to develop new and improved methods of training rehabilitation personnel to achieve more effective delivery of rehabilitation services by State and other rehabilitation agencies.

**Summary of Comments and Responses**

A notice of proposed annual funding priority was published in the *Federal Register* on May 21, 1986 (51 FR 18651) for the Experimental and Innovative Training Program. No comments were received in response to the Notice of Proposed Priority within the designated period for comment. No change has been made.

**Final Priority**

In accordance with the Education Department General Administrative Regulations (EDGAR) at 34 CFR 75.105(c)(3), the Secretary will give an absolute preference to applications submitted under the Experimental and

Innovative Training Program in fiscal year 1986 that respond to the priority described below. An absolute preference is one which permits the Secretary to select only those applications that meet the described priority.

All applications submitted under the Experimental and Innovative Training Program must address the training of rehabilitation counselors employed by State vocational rehabilitation agencies. State vocational rehabilitation agencies have only recently begun to serve learning disabled adults. It is essential, therefore, that rehabilitation counselors develop and maintain skills that will enable them to identify adults who are learning disabled, determine the eligibility of those individuals to receive rehabilitation services, and plan rehabilitation programs for and deliver services to learning disabled individuals. The training must also emphasize improved coordination of services between special education and vocational rehabilitation service providers and the effective use of resources in the community to facilitate the transition of learning disabled individuals from school to employment.

(Catalog of Federal Domestic Assistance No. 84.129, Rehabilitation Training)

(29 U.S.C. 774)

Dated: July 29, 1986.

William J. Bennett,

Secretary of Education.

[FR Doc. 86-17319 Filed 7-31-86; 8:45 am]

BILLING CODE 4000-01-M



# Best of Federal Practice

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Friday  
August 1, 1986

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## Part VII

### Department of Education

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Office of Special Education and  
Rehabilitation Services

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Rehabilitation Long-Term Training  
Program; Notice of Final Funding Priority  
for Fiscal Year 1986



**DEPARTMENT OF EDUCATION****Office of Special Education and Rehabilitation Services****Rehabilitation Long-Term Training Program****AGENCY:** Department of Education.**ACTION:** Notice of Final Funding Priority for Fiscal Year 1986.

**SUMMARY:** The Secretary announces an annual funding priority for long-term training grants in the field of Rehabilitation Workshop and Facility Personnel in order to ensure effective use of program funds and to direct funds to areas of identified need during fiscal year 1986. The Secretary will give an absolute preference to applications that meet the terms of the priority.

**EFFECTIVE DATE:** This final annual funding priority takes effect either 45 days after publication in the *Federal Register* or later if Congress takes certain adjournments. If you want to know the effective date of this final annual funding priority, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:** Delores L. Watkins, Division of Resource Development, Rehabilitation Services Administration, U.S. Department of Education, 400 Maryland Avenue, SW., (Room 3324-M/S 2312,

Mary E. Switzer Building), Washington, DC 20202. Telephone: (202) 732-1332.

**SUPPLEMENTARY INFORMATION:** Grants for the Rehabilitation Training Program are authorized by Title III, section 304 of the Rehabilitation Act of 1973, as amended. Program regulations for the Rehabilitation Long-term Training Program are established at 34 CFR Part 386. The purpose of the Rehabilitation Long-term Training Program is to support projects designed to train personnel for employment in public and private agencies involved in the rehabilitation of physically and mentally disabled individuals, especially those who are severely disabled.

**Summary of Comments and Responses**

A notice of proposed annual funding priorities was published in the *Federal Register* on May 20, 1986 at 51 FR 18549. No letters of comment were received in response to the Notice of Proposed Priority. No change has been made.

**Final Priority**

In accordance with the Education Department General Administrative Regulations (EDGAR) at 34 CFR 75.105(c)(3), the Secretary will give an absolute preference to long-term training applications submitted in the field of Rehabilitation Workshop and Facility Personnel in fiscal year 1986 that respond to the priority described below. An absolute preference is one which

permits the Secretary to select only those applications that meet the described priority.

All applications submitted in the long-term training field of Rehabilitation Workshop and Facility Personnel must address the training of personnel who are employed by and provide direct rehabilitation services in vocationally oriented workshops and facilities. The training must focus on the development and upgrading of skills of such categorical types of workshop and facility personnel as vocational instructors, production supervisors and resident supervisors. The training must develop and upgrade the skills of such direct service delivery personnel to use new and innovative methods and techniques in the vocational rehabilitation of physically and mentally disabled individuals and their placement into competitive employment. The training must also increase the skills of those trained to provide transitional employment and supported employment services to disabled individuals.

(Authority: 29 U.S.C. 774)

(Catalog of Federal Domestic Assistance No. 84.129, Rehabilitation Training)

Dated: July 29, 1986.

**William J. Bennett,**  
*Secretary of Education.*

[FR Doc. 86-17320 Filed 7-31-86; 8:45 am]

BILLING CODE 4000-01-M



# Test Retest Federal

Friday  
August 1, 1986

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## Part VIII

## Department of Education

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Rehabilitation Long-Term Training  
Program; Notice



**DEPARTMENT OF EDUCATION****Rehabilitation Long-Term Training Program****AGENCY:** Department of Education.**ACTION:** Notice of Final Funding Priorities for Fiscal Year 1986.

**SUMMARY:** The Secretary announces final funding priorities for long-term training grants in the field of Rehabilitation Counseling to ensure effective use of program funds and to direct funds to areas of identified need during fiscal year 1986. The Secretary will reserve funds for applications meeting these priorities.

**EFFECTIVE DATE:** These final annual funding priorities take effect either 45 days after publication in the *Federal Register* or later if Congress takes certain adjournments. If you want to know the effective date of these final funding priorities, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:**

Delores L. Watkins, Division of Resource Development, Rehabilitation Services Administration, U.S. Department of Education, 400 Maryland Avenue, SW., (Room 3324-M/S 2312, Mary E. Switzer Building), Washington, DC 20202. Telephone: (202) 732-1332.

**SUPPLEMENTARY INFORMATION:** Grants for the Rehabilitation Training Program are authorized by Title III, section 304 of the Rehabilitation Act of 1973, as amended. Program regulations for the Rehabilitation Long-Term Training Program are established at 34 CFR Part 386. The purpose of the Rehabilitation Long-Term Training Program is to support projects designed to train personnel for employment in public and private agencies involved in the rehabilitation of physically and mentally handicapped individuals, especially those who are the most severely handicapped.

**Summary of Comments and Responses**

A notice of proposed annual funding priorities was published in the *Federal Register* on April 25, 1986 (51 FR 15665-15666) for the long-term training field of Rehabilitation Counseling. A total of 18 letters commenting on the priorities were received in response to the Notice of Proposed Priorities within the designated period for comment. Comments were received from professional rehabilitation counseling organizations, educators of rehabilitation counseling personnel and State vocational rehabilitation unit personnel. The following is a summary

of comments which were related to the substance of the priorities and the Secretary's responses to those comments.

**Comment.** Eleven commenters suggested that the central theme of the priorities is too narrow for an academic degree program in a university and suggested that the priorities for Rehabilitation Counseling be made comparable to those published for other types of rehabilitation training. In accordance with this suggestion, commenters further suggested that standards for the accreditation of master's degree rehabilitation counseling training programs and for the certification of rehabilitation counselors be used to ensure balance in the rehabilitation curriculum of rehabilitation counseling training projects.

**Response.** A change has been made in the introductory statement to the three priorities to clarify the intent of the training described under the three individual priorities. The language has been modified to make clear that all applications submitted in response to the described priorities must be directed to strengthening the capacity of rehabilitation counseling and other rehabilitation personnel to place severely disabled individuals in employment. The training content described in priority one, as part of the total training provided, is intended to emphasize the acquisition of skills by students in master degree rehabilitation counseling programs in developing jobs for and placing severely disabled individuals in employment. Priorities two and three are directed to the training of other rehabilitation personnel whose job development and job placement functions specifically include the need for special skills in providing supported employment services to severely disabled individuals. The Department agrees that rehabilitation counseling programs of a traditional nature must ensure balance in their training curricula so that students are provided broad exposure to all types of rehabilitation services for disabled individuals.

**Comment.** Seven commenters suggested that no division of funds for rehabilitation counseling training projects be made by academic level and that funds be made available only for the support of master's degree rehabilitation counseling training. The commenters also suggested that the funding of rehabilitation counseling training projects at the undergraduate and doctoral degree levels was inappropriate.

**Response.** No change has been made. Training described under priorities two and three is not directed to content traditionally provided in a master's degree rehabilitation counseling program in a university or college. Priority two is targeted to the training of rehabilitation personnel who will have specialized skills in providing supported employment services to severely disabled individuals. Training described under priority three is intended to combine the skills described under priorities one and two in order to prepare rehabilitation personnel who will have specialized skills in developing jobs for and placing disabled individuals in employment in business and industry and providing supported employment services. The Department believes it is, therefore, appropriate to make division of funds for the training of such specialized rehabilitation personnel at academic levels other than the master's degree level.

**Comment.** One commenter expressed concern that the priorities appeared to reflect the endorsement of the supported employment services model and to emphasize the development of jobs for and placement of only severely disabled individuals into competitive employment.

**Response.** No change has been made. Priorities two and three are directed to the training of rehabilitation personnel who will have specialized skills in providing supported employment services to severely disabled individuals. The Department has identified a need to provide Federal support to train specialized rehabilitation personnel to provide supported employment services in order to upgrade the vocational placements for severely disabled individuals who have traditionally been placed in non-competitive employment settings.

**Final Priorities**

In accordance with the Education Department General Administrative Regulations [EDGAR] at 34 CFR 75.105(c)(3), the Secretary will give an absolute preference to long-term training applications submitted in the field of Rehabilitation Counseling in fiscal year 1986 that respond to one of the priorities described below. An absolute preference is one which permits the Secretary to select only those applications that meet the described priorities.

All applications submitted in the long-term training field of rehabilitation counseling must be designed to improve and strengthen the capacity of rehabilitation counselors and other



rehabilitation personnel to place severely disabled individuals into employment, especially competitive employment. All training must include a job development and job placement component in one of the following areas:

#### *Priority 1*

The training under this priority must include placement services that will directly involve rehabilitation counseling students with business and industry in providing rehabilitation services to severely physically and mentally disabled individuals. The placement coursework must be designed to enable students to acquire skills and knowledge in the areas of: (1) job development, analysis, job modification, and job restructuring; (2) workers' compensation; (3) forecasting labor market trends; (4) the applicability of sections 503 and 504 of the Rehabilitation Act and their implications for placement of disabled individuals; and (5) effective consultation with employers and potential employers to identify employment opportunities for disabled individuals, to assist in the removal of barriers to the employment of disabled individuals, and to educate or train employers and potential employers about various disabilities and any vocational implications of those disabilities. Practicum training must include job development and job placement activities that involve students directly with business and industry. A primary element of the training must be the direct participation of students with business and industry in placing disabled individuals into competitive employment and may include actual participation of students in practicum experiences in business

and industry settings. The training must be at the master's degree level.

#### *Priority 2*

The training under this priority must include a training curriculum that will prepare rehabilitation personnel to provide supported employment services to severely disabled adults. Supported employment, as used here, means paid work in a variety of integrated settings that include both handicapped individuals and non-handicapped individuals, particularly regular work sites, especially designed for severely handicapped individuals, irrespective of age or vocational potential—(1) for whom competitive employment at or above the minimum wage has not traditionally occurred; and (2) who, because of their disability, need intensive on-going post-employment support to perform in a work setting. The training curriculum must include coursework to enable students to acquire skills and knowledge in the areas of: (1) behavioral analysis; (2) job analysis; (3) job development, job modification, job accommodation, and job placement; (4) specific job-skills training; (5) employer relations; and (6) union relations. In addition to the specific skills previously listed, training is expected to provide students with knowledge about the various social service systems which affect the lives of disabled individuals, including: (1) State vocational rehabilitation agencies; (2) State developmental disabilities agencies; (3) State employment security systems; (4) workers' compensation; (5) private rehabilitation systems within industry; (6) projects with industry; (7) independent living programs; (8) sections 501, 502, 503, and 504 of the Rehabilitation Act and their

implications for placement of disabled individuals; and (9) provisions of the Social Security Act which relate to disabled individuals. Students must be provided practicum experiences at supported employment sites. Because of the required practicum experience element, applications must show evidence of an on-going established relationship with supported employment programs. The training must be at the bachelor's degree level or above.

#### *Priority 3*

The training under this priority must prepare rehabilitation personnel to develop jobs for and place severely disabled individuals into competitive employment in business and industry settings. The training must also focus on supported employment placements of disabled individuals in business and industry settings. Training supported under this priority must include a curriculum that combines the specific skills designated under the previous two priorities. The training must be at the doctoral level.

A separate application review competition will be conducted for each of the three priorities described for the rehabilitation long-term training field of Rehabilitation Counseling. Each application must respond to only one of the described priorities.

(29 U.S.C. 774)

(Catalog of Federal Domestic Assistance No. 84.129, Rehabilitation Training)

Dated: July 29, 1986.

**William J. Bennett,**  
*Secretary of Education.*

[FR Doc. 86-14200 Filed 7-31-86; 8:45 am]

BILLING CODE 4000-01-M



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# Lead-Based Paint

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Friday  
August 1, 1986

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## Part IX

### Department of Housing and Urban Development

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Office of the Secretary

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24 CFR Part 35 et al.  
Lead-Based Paint Hazard Elimination;  
Final Rule and Proposed Rule



# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## Office of the Secretary

24 CFR Parts 35, 905, 965 and 968.

[Docket No. R-86-1165: FR-1748]

## Lead-Based Paint Hazard Elimination in Public and Indian Housing

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Final rule.

**SUMMARY:** This rule amends regulations regarding the elimination of hazards due to lead-based paint in Public and Indian housing. It amends 24 CFR Part 35, Lead-Based Paint Poisoning Prevention in Certain Residential Structures, adds new subpart H in 24 CFR Part 965, PHA-owned or Leased Projects—Maintenance and Operation, and amends 24 CFR Parts 905, Indian Housing, and 968, Comprehensive Improvement Assistance Program (CIAP). Changes in the funding priorities for CIAP are also provided. Funding groups are revised with certain lead-based paint testing and hazard abatement preferences.

HUD has amended its regulations implementing section 302 of the Lead-Based Paint Poisoning Prevention Act ("LPPPA") in light of advances in knowledge regarding the causes of elevated blood lead levels of children as well as hazard detection and abatement techniques. HUD has also reexamined its regulations pursuant to the mandate of *Ashton v. Pierce*, 716 F.2d 56 (D.C. Cir. 1983), a case in which public housing tenants in the District of Columbia challenged the adequacy of HUD's lead-based paint regulations.

**EFFECTIVE DATE:** September 23, 1986.

**FOR FURTHER INFORMATION CONTACT:** Nancy Chisholm, Director of Policy, Office of Public and Indian Housing, (202) 755-6713, Room 4118, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410. (This is not a toll-free telephone number.)

### SUPPLEMENTARY INFORMATION:

#### I. Background

This rulemaking was initiated by publication of an Advance Notice of Proposed Rulemaking ("ANPR") 49 FR 19210, May 4, 1984, which solicited public comment on issues relating to implementation of lead-based paint detection and hazard abatement procedures in the many distinct HUD programs to which the statute applies.

A proposed rule, which related primarily to public housing, was published (51 FR 5666, February 14,

1986) pursuant to a subsequent order of the Federal District Court. The same order requires publication of this final rule not later than August 1, 1986.

Pursuant to a subsequent order of the District Court, HUD published (51 FR 24112, July 1, 1986) a proposed rule prescribing lead-based paint hazard detection and abatement requirements applicable to the FHA single-family and multifamily insurance programs, the Section 8 Existing Housing Certificate program and other insured or assisted housing programs. Additional proposed rules prescribing procedures applicable to rehabilitation assisted under the Community Development Block Grant and other HUD programs are also required to be published not later than August 1, 1986.

In developing these regulations, HUD considered what procedures are "practicable" (as required by the LPPPA, and as discussed in *Ashton* below) within these different program contexts. The factors considered in this rulemaking are different from the other rulemaking because, in each of such programs, the cost of hazard abatement is a private cost. In the single-family insurance programs, for example, the cost of hazard abatement required to qualify an existing property for FHA mortgage insurance on resale of the property must be borne by the seller of the home. In Section 8 Existing Housing Certificate, Housing Voucher and Moderate Rehabilitation programs, the cost of any hazard abatement required to qualify the rental unit as one in which a very low-income tenant's rental payment will be subsidized must be borne by the landlord. The impact of such costs on availability of the programs to their intended participants is a relevant consideration in determining whether requirements are "practicable". See Section IV. below.

This preamble is divided into the following five sections: (1) Background (discussion of statutory and regulatory requirements and the *Ashton* decision); (2) Proposed Public and Indian Housing Rulemaking and Comments; (3) Recent Studies of the Lead-Based Paint Problem (including a public housing study and the Environmental Protection Agency's Air Quality Criteria for Lead); (4) Requirements for Public and Indian Housing's Program; and (5) Section-by-Section Review of Proposed Regulations.

#### A. Statutory and Regulatory Requirements

HUD's authority to issue this rule is based on section 302 of the LPPPA, 42 U.S.C. 4822. Added in 1973, section 302 requires the Secretary of HUD to

"establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary." The public housing programs covered by this final rule involve a contract for housing assistance payments. The statute further prescribes that such procedures shall "as a minimum provide for . . . appropriate measures to eliminate as far as practicable immediate hazards due to the presence of paint which may contain lead and to which children may be exposed"; and further, that the procedures must apply to housing constructed prior to 1950 and "may apply to housing constructed during or after 1950 if the Secretary determines, in his discretion, that such housing presents hazards of lead-based paint."

HUD implemented section 302 of the LPPPA by promulgating regulations in 1976 which are found at 24 CFR Part 35 and by incorporating Part 35 in other program-specific regulations. The development of that regulation is fully described in the ANPR. The key provisions of the 1976 version of Part 35 define an "immediate hazard" requiring treatment as "paint (which may contain lead) on applicable surfaces which is cracking, scaling, chipping, peeling or loose." The definition did not require that the lead content in the paint be measured or identified, only that the condition of the paint be defective. Also, the definition excluded intact, or "tight", paint regardless of its lead content. The hazard elimination procedures in Part 35 were applicable to all "HUD-associated housing" regardless of construction date. This final rule will amend Part 35 and supersede Subpart C of Part 35's minimum requirements by establishing specific program requirements. The public and Indian housing proposed rule (51 FR 5666, February 14, 1986) suggested a 1978 construction cut-off date for Subpart C of Part 35 (defective paint hazard elimination). Public comments were received on this point. See section II.A below. Alternative construction cut-off dates (1950 and 1978) were proposed for Subpart C in the proposed rule published July 1, 1986 (51 FR 24112). This final rule amends Subpart C by using a 1978 construction cut-off date. This final rule is not intended to settle the issue, but will remain in effect on this matter until rulemaking for Part 35 is completed.



### B. The Ashton Decision

In *Ashton v. Pierce*, public housing tenants in the District of Columbia challenged the adequacy of the Department's lead-based paint regulations. The plaintiff alleged that HUD's lead-based paint regulation was deficient for failing to define "tight" lead-based paint surfaces as an "immediate hazard" requiring treatment.

The District Court determined the issues on motions for summary judgment based on the statutory language and legislative history and the administrative record of the Department's rulemaking. The District Court found that the regulations were deficient in not treating lead-based paint accessible to children as an immediate hazard, and in failing to prescribe sufficient steps to eliminate accessible lead-based paint "as far as practicable." The District Court ordered the Department to "undertake further rulemaking to establish appropriate procedures for the elimination of lead-based paint hazards in federally-associated public housing, including so-called tight paint." *Ashton v. Pierce*, 541 F. Supp. 635, 642 (D.D.C. 1982).

The Court of Appeals affirmed the District Court order. *Ashton v. Pierce*, 716 F.2d 56 (D.C. Cir. 1983). The Court of Appeals found, first, that Congress intended the phrase "immediate hazard" not to be limited to paint in a defective condition. The Court of Appeals also held that the Department had applied an erroneous standard in determining whether it was "practicable" to eliminate the immediate hazard of intact lead-based paint. In the Court of Appeal's view, HUD had construed "as far as practicable" to mean "most practicable." The Court expressly rejected what it considered to be a "cost-benefit analysis" approach employed by the Department.

In plain language Congress commanded that if it is "practicable" to eliminate an immediate hazard, that hazard must be eliminated. The statute admits of no exceptions to the required elimination procedures on the basis of the degree of practicability. Neither Congress' concern about the cost of the elimination program nor congressional silence in the face of the Department's interpretation of the statute can overcome the clear statutory directive. *Id.* at 64.

The Court of Appeals concluded, however, that the administrative record had not established that elimination of chewable intact paint is in fact practicable. The Court of Appeals stated:

It is peculiarly within the expertise of the Department to determine the practicability of

a given elimination procedure. We agree with the district court that the "as far as practicable" standard allows the Department "to consider cost and technical considerations in developing its regulations" and that the threshold of practicability is reached if there exist "reasonably available techniques" for eliminating the hazard. . . . *Id.*

The Court of Appeals affirmed the requirement to reopen rulemaking to determine under what conditions intact paint containing lead constituted an immediate hazard. The Court affirmed the Department's broad discretion in making this determination.

\* \* \* Like the district court, we note that "in carrying out further rulemaking [the Department] retains substantial discretion to adopt regulations of a scope and effect it deems appropriate. \* \* \* We simply hold that the Department's "complete failure to address the hazards associated with "tight" paint containing lead is contrary to the intent of Congress." *Id.*

For a complete discussion of the *Ashton* decision, see 51 FR 5666, February 14, 1986.

### II. Proposed Public and Indian Housing Rulemaking and Comments

A proposed rule regarding elimination of hazards due to lead-based paint in public and Indian housing was published on February 14, 1986 (51 FR 5666). This proposed rule is to amend 24 CFR Parts 35, Lead-Based Paint Poisoning Prevention to Certain Residential Structures; 905, Indian Housing; and 968, Comprehensive Improvement Assistance Program (CIAP); and proposed a new subpart H in 24 CFR Part 965, PHA-owned or Leased Projects—Maintenance and Operation. The proposed rule discussed six principal elements: (1) Program Requirements (General); (2) Testing; (3) Abatement; (4) Funding; (5) Notification; and (6) Monitoring and Enforcement. Several questions within most of these elements were raised. Comments were received on most of the questions presented in the proposed rule. Twenty-eight comments were received from commenters including public housing authorities ("PHAs"), state health departments, trade associations, Federal agencies, environmental groups, contractors, research consultants, a lead detection equipment manufacturer, a pediatric hospital, a health related organization, and a private law firm. Commenters submitted or referred to numerous articles and papers that addressed additional aspects of the problem.

This section will discuss the proposed rule questions and comments regarding public and Indian housing in order of the

questions presented in the proposed rule and then comments received on the remaining principal elements.

#### A. Program Requirements

Two general questions were posed regarding the proposed program requirements. The first question was "Whether all paint surfaces where lead analysis produces a reading greater than or equal to 0.7 mg/cm<sup>2</sup> that are in unsound condition or on chewable surfaces (as defined), and in the locations described in the proposed rule, must be considered "immediate hazards due to the presence of paint which may contain lead and to which children may be exposed" in all circumstances, regardless of date of construction and the presence or absence of children in a unit?"

Twelve commenters representing all concerns responded to this question. Seven commenters agreed that such readings must be considered immediate hazards. Two commenters conditioned their comments on further evaluation of the testing equipment before such readings are considered an indication of an immediate hazard. One commenter limited immediate hazards to exposed surfaces coated with lead-based paint. One manufacturer of an X-ray fluorescence analyzer ("XRF") discussed the 0.7 mg/cm<sup>2</sup> level by describing the precision of its equipment at the 0.7 mg/cm<sup>2</sup> level. Additional comments regarding the 0.7 mg/cm<sup>2</sup> level and accuracy of the XRF are discussed below in Section II.B.7.a. Commenters which agreed that such readings must be considered immediate hazards also suggested a 0.1 mg/cm<sup>2</sup> cutoff level should be used because this level is necessary to provide reasonable protection for young children and pregnant women. One commenter suggested that 0.1 mg/cm<sup>2</sup> is a realistic goal, and that HUD could record readings above 0.1 mg/cm<sup>2</sup> but only take action on those that have 0.7 mg/cm<sup>2</sup> readings (A two stage abatement procedure might be required later). It was stated that the proposed limit of 0.7 mg/cm<sup>2</sup> was based upon technological considerations and not on health considerations. The commenter further noted that a recent clinical study concluded that a limit of lead in paint of 0.7 mg/cm<sup>2</sup> does not provide adequate protection of young children against lead toxicity. (Chisolm, Mellitts and Quaskey (1985)). Children, who were tested for lead poisoning and then returned to houses in which lead-based paint surfaces containing more than 0.7 mg/cm<sup>2</sup> had been abated using propane torches and extensive sanding, still



maintained highly elevated blood lead concentrations; their average level was 38  $\mu\text{g pb/dl}$  (micrograms of lead per deciliter of whole blood). That blood lead level substantially exceeds currently acceptable limits (The Centers for Disease Control ("CDC") has defined an elevated blood lead level ("EBL") which reflects excessive absorption of lead as a confirmed concentration of lead in whole blood at 25  $\mu\text{g/dl}$  or greater). However, those children transferred to "lead free" housing maintained significantly lower blood lead concentrations, with most children's blood lead levels eventually falling within the safe range.

The commenter also stated that since the publication of the ANPR and the publication of the CDC's January 1985 Statement on the Prevention of Lead Poisoning in Children, the state of the art for detection of lead-based paints has substantially improved. A new portable XRF lead analyzer with a detection limit of 0.1  $\text{mg/cm}^2$  is now on the market and is in use. The commenter further stated that analyses of painted surfaces (American Academy of Pediatrics, 1972) indicate that the use of a limit of 0.1  $\text{mg/cm}^2$  for selection of surfaces from which lead paint is to be removed will come much closer than any higher limit value to providing reasonable health protection for young children and pregnant women.

One commenter stated that the language of section 302 of the LPPPA compels a definition of immediate hazard that includes any lead-based paint that is accessible to children. The commenter noted that HUD has recognized its obligation to require removal of lead-based paint to which children may be exposed by including chewable intact lead-based paint in its definition of immediate hazard but has omitted from coverage certain housing and certain surfaces where immediate hazards are surely present, (i.e., housing for the elderly, housing built after 1973, exterior surfaces (HUD proposed in certain cases spot removal and did not mention walls as applicable surfaces), lead in soils and potential hazards).

Commenters who questioned whether such readings must be considered immediate hazards offered the following technical advice and local requirements. One commenter stated that the 0.7  $\text{mg/cm}^2$  positive value is based on a National Bureau of Standards ("NBS") evaluation (NBSIR 78-1466) of then commercially available XRF analyzers. Only one of the analyzers tested is still available and it was tested as a prototype at that time. The state-of-the-art in lead detection technology has

advanced in the years since this independent evaluation was done. Currently two manufacturers are marketing XRFs for this purpose. One manufacturer claims sensitivities of 0.1  $\text{mg/cm}^2$ . If this claim was substantiated by an independent agency, CDC might consider lowering the definition of a positive response (CDC has recommended that readings by XRFs greater than or equal to 0.7  $\text{mg/cm}^2$  for lead on painted surfaces be considered positive).

The New York City Housing Authority indicated that it follows the New York City Health Code which requires both the existence of hazardous lead-based paint level (0.7  $\text{mg/cm}^2$ ) and a blood lead level of 30-40 micrograms per deciliter with a free erythrocyte protoporphyrin of 50 micrograms per deciliter or higher before abatement is required. For further discussion of the accuracy of XRF and the 0.7  $\text{mg/cm}^2$  level, see section II.B.7.a.

The second general question regarding program requirements was "Whether the abatement treatment required in this proposed rule is 'practicable' in all circumstances encompassed by the proposed rule and should, in the Secretary's discretion, be required for housing constructed after 1950 and, if so, for what periods or under what circumstances?"

Ten commenters responded to this question. The majority considered the proposed abatement requirements to be impracticable because they were too costly, time restrictive and not necessary to carry out an effective program. Three commenters suggested the proposed abatement requirements were practicable and praised HUD for its approach. Two commenters suggested that the Secretary should begin with housing constructed before 1950 and then proceed to housing constructed between 1950 and 1978. *Ashton* plaintiffs' counsel suggested that HUD must consider post-1973 housing and may not legally await positive evidence of lead-based paint in the form of a poisoned child before it promulgates regulations requiring the testing and elimination of hazardous paint. Another commenter suggested a construction cut-off date of 1977 but expressed the need for a pilot city study of post-1977 housing. This commenter further noted that while the *Ashton* court did not order HUD to require abatement in post-1950 housing, the LPPPA requires the abatement of lead-based paint hazards if HUD determines that such hazards exist. One commenter also agreed that not only housing units but also common areas and non-

dwelling facilities are "practicable" areas for treatment. CDC considered the question irrelevant and said, "If the surveys are as complete and thorough as proposed, and lead is found as expected, the question is the will to carry out the abatement program in face of competition for resources. It makes no difference when the housing was constructed if leaded paint is found—it must be removed." For a further discussion of specific abatement comments, see section II.C.

Based on public comments and HUD's recent observations of lead-based paint detection techniques and abatement methods, HUD will be requiring testing and abatement of lead-based paint hazards in public housing units where an EBL child is identified. Child care facilities owned or operated by the PHA and used by that EBL child will also be tested and as necessary promptly abated. Testing and abatement of exteriors and common areas where EBLs are involved will be done as considered necessary and appropriate by the PHA and HUD. PHAs will be required to test and abate family units between occupants when the incoming family has an EBL child.

Lead-based paint testing and abatement can also be undertaken as part of comprehensive modernization. The comprehensive modernization requirements apply to family projects: (i) Constructed or substantially rehabilitated prior to 1973, or (ii) constructed or substantially rehabilitated during or after 1973 but before 1978 under circumstances not subjecting such construction or rehabilitation to the requirements of 24 CFR Part 35 (as then in effect). The abatement requirements will apply to defective paint surfaces and chewable surfaces, which contain lead-based paint. In testing for lead content, HUD will use a standard of 1.0  $\text{mg/cm}^2$ . See section II.B.7. for a further discussion of the testing standard. Abatement methods are described below in section II.C. HUD will also require a maintenance obligation for defective paint surfaces found in family projects constructed prior to 1978. For a fuller discussion of the Public Housing program, see section IV. below.

#### B. Testing

Six questions were presented in the proposed rule's discussion of testing for lead-based paint. Fifteen commenters, representing a broad cross-section of commenters, responded to the testing questions. Other aspects of the testing element of the proposed program also received comment.



1. HUD requested public comments on the feasibility of the two-year timeframe, given the number of testing machines or Childhood Lead Poisoning Prevention Programs ("CLPPPs") in the country and the size and number of PHAs. All but one of the commenters responding to this question indicated that the two-year timeframe was infeasible. One commenter believed that HUD must require that the PHAs complete the process faster, particularly in view of its failure to begin the process in the 13 years since passage of the LPPPA. Commenters offered alternative testing periods ranging from six months to twenty years and indicated several additional problems associated with a two-year timeframe. One commenter stated that because HUD is proposing to test units constructed between 1950 and 1973, this additional burden requires that HUD modify its schedule to permit a period of three years for its testing. One commenter suggested that if HUD insists on testing all apartments in projects where tests showed the existence of hazardous lead-based paint, very large PHAs, especially New York, would require an extension from a two-year testing period to four years, because of the number of apartments that would require testing. One PHA stated that it had no operating funds available to purchase the machinery, labor, and materials needed to fulfill the requirements of the proposed rule within any timeframe. It further added that regardless of funding, the testing process is not practicable given the availability of XRFs and the time needed to test a unit. The level of impracticability increases with every unit identified as having lead-based paint, for that increases the number of units that must be included in the testing process. An alternative to a mandated timeframe is to incorporate testing and abatement into the ongoing processes of normal vacancy preparation and federally funded modernization (unless EBLs are detected). The Council of Large Public Housing Authorities ("CLPHA") indicated that the time period to complete testing is dependent upon the funds made available to do this work. If no additional funds are made available, the proposed time limit is clearly impracticable. One PHA agreed that the two-year testing program was only feasible with additional funds and also indicated that the proposed testing program would be difficult and would distort repair and modernization programs underway. It was further suggested that HUD should both guarantee funding and make some effort to extend the time limit and allow PHAs

to fit a testing program into current repair programs in a rational way.

Instrument experts at Georgia Tech Research Institute concluded that a two-year timeframe was not realistic. They suggested that a uniform training program should be available for PHAs because "non-technical" personnel may obtain erroneous results if they do not have an understanding of how the instrument actually arrives at the number representative of the area concentration of lead. They also suggested that a technical resource center should be established for the duration of the program in order to provide focus to the technical aspects of lead detection methodology, provide a single contact point for questions and guidance in proper use of specified methods and act as an "information collection center". The establishment of a technical resource center would require more "up-front" time, but would result in a higher public and agency level of confidence and would reduce overall costs.

HUD will not be requiring testing of all public housing within two years. Testing will be required in cases where an EBL child is identified as a resident of public housing and in cases where an incoming family has an EBL child. For any comprehensive modernization funded at the time the regulation becomes effective and thereafter, PHAs will be required to randomly test and abate lead-based paint only if the project involves the breaking of a painted surface.

2. HUD requested comments on the availability of testing resources for PHAs. Three commenters responded to this question and indicated that testing resources were scarce. A PHA indicated that there are no operating funds or funds available on the state or local level which would permit PHA compliance with the testing requirements, and it objected to adding these requirements to an already overburdened and underfunded CIAP. The New York City Housing Authority indicated that it takes a health and housing approach. The local health department notifies the PHA whenever a child in one of the PHA's units has an EBL and their XRF tests show a reading of 0.7 mg/cm<sup>2</sup> or higher. After this notification, the PHA inspects the unit and validates the XRF results by submitting paint chip samples for laboratory testing. One state department of health noted that state and local agencies are suffering from budget restrictions which leave them ill-prepared to assume any additional

responsibilities such as XRF testing and blood lead level screening for PHAs.

HUD will encourage PHAs to seek state and local funding for testing for lead-based paint but recognizes that federal funding will be the primary resource for testing. Blood lead level screening will continue to be done by the state, local and private health agencies now serving the public housing population.

3. HUD requested comments regarding quality control techniques. Two commenters responded to this question and suggested quality control guidelines should be established regarding the use of XRFs. (The XRF response is dependent upon the nature of the surface being examined. Improper use of an XRF on sculptured surfaces, surfaces with peeling paint, soil or dust on floors, multi-paint layers, etc. may lead to erroneous results. The best intentioned operator may have misunderstandings concerning proper use of the XRF in other than ideal circumstances, e.g. tightly painted surfaces. A standard guidebook should be prepared to insure proper use of XRFs by non-technical personnel.) XRFs must be calibrated using field available standards of known lead levels prior to use. One PHA indicated that it evaluates XRF tests by submitting paint chip samples for laboratory atomic absorption tests.

HUD will not be developing quality control guidelines. CDC guidelines on testing and abatement are suggested.

4. HUD requested comments on HUD's responsibility when there are not local or state standards or supervision. HUD proposed continuation of its current provision that the PHA is responsible for compliance with state or local laws, ordinances, codes or regulations governing lead-based paint hazard abatement. In order to promote efficiency, HUD proposed that it would defer to state or local requirements that provide for a comparable level of protection from lead-based paint hazards. Four commenters responded generally to this question and indicated that HUD should clarify which state or local laws are acceptable substitutes for HUD regulations. It was suggested that Massachusetts laws insured a comparable level of protection but that New York laws do not provide as stringent requirements. Commenters further added that the state and local standards have to be at least as stringent as the federal standard in order to be entitled to deference. Commenters also noted that many state and local governments have failed to adopt or to enforce requirements necessary to protect public health from



the hazards of lead-based paint. While state and local authorities should retain the discretion to establish and enforce more stringent programs, the federal government must guarantee a minimum level of safety and health protection.

HUD will retain its current provision that the PHA is responsible for compliance with state or local laws, ordinances, codes, or regulations governing lead-based paint hazard abatement. HUD funds may be used to meet all state or local codes. HUD's field counsel will determine whether state or local requirements provide a comparable level of protection from lead-based paint hazards. The field counsel will be provided guidelines to assist in making these determinations. These determinations can be reviewed by HUD headquarters' counsel.

5. HUD requested comments regarding any tribal quality control standards. No commenters responded to this request and no comments were received on the application of the proposed rule to Indian Housing Authorities.

6. Certain CLPPPs may be using only laboratory chemical analysis. HUD was interested in learning which localities use only this method. HUD was considering paying (through the modernization program) for the equivalent cost of using XRFs, but requested comments from local lead programs and the scientific community regarding laboratory chemical analysis standard and equivalency of test results with XRFs. Two commenters responded to this question and indicated that there is no way to correlate the measurements it uses (parts per million) with mg/cm<sup>2</sup>, and that there is no direct equivalence between laboratory analysis for lead and XRF response unless the thickness of the lead layer is known. This thickness may be determined by using a scanning electron microscope. It may be desirable to determine this equivalency at select sites to provide some idea of the overall efficiency of field detection methods. Comparison of lab and field results at a relatively small number of select sites would provide for determination of a statistical confidence level for the overall program.

Three comments indicated that laboratory chemical analysis should be permitted as a means of detection of lead-based paint for several reasons. The Public Housing Agency of the City of Saint Paul stated that their health departments were dissatisfied with XRF readings and that they send paint chips for analysis to a laboratory for approximately \$12.00 a sample. The Boston Housing Authority indicated that of the limited number of companies available in the Boston area to test for

lead-based paint, a minority use the XRF. The non-laboratory chemical analysis approach (using sodium sulfide), which is permitted under Massachusetts law, will enable PHAs to have more access to more testing services and will accelerate the process of testing and abatement. CLPHA recommended that where it is the preference of the PHA, laboratory chemical analysis should be an equally acceptable alternative method of testing.

Testing utilizing the XRF will be an allowable modernization cost. Laboratory chemical analysis may be used if approved by HUD in cases where it is not practical to obtain XRF readings.

7. *Miscellaneous.* Sixteen commenters noted additional concerns, criticisms and suggestions pertaining to the proposed testing procedure. These comments have been grouped into the following five areas: (a) Problems with the XRF; (b) Random Testing; (c) Other Surfaces and Areas to Test; (d) Priorities for EBLs; and (e) Housing Approach.

*a. Problems with the XRF.—i.*

*Accuracy.* Five out of six commenters suggested that readings produced by XRFs were very inaccurate. Commenters indicated that the XRF reads the opposite side of the wall as well as the side of the wall being tested, detects lead pipes nearby or lead in walls or other leaded materials. False readings can result and cause unnecessary removal at great expense. The XRF machines are often inaccurate at the levels approximating 0.7 mg/cm<sup>2</sup> or less, often by a factor of 100%. Based upon a comparison of XRF readings and laboratory atomic absorption tests, the New York City Housing Authority has found the XRF to be accurate only 3% of the time at the 0.7 mg/cm<sup>2</sup> level. They have explored the possible reasons for the differences in the readings and have concluded that wall construction is the key factor. All specifications for apartment projects' walls constructed prior to 1978 required a three coat plaster with a wire lathe base. The XRF may be detecting the lead in the wire lathing. They recommend that HUD further investigate the effectiveness and reliability of the XRF test results on walls constructed with materials other than sheet rock wall board. Based on CDC's recommendations, one commenter suggested that XRFs can measure down to 0.7% with an acceptable margin of reliability and the margin of error is small.

*ii. The 0.7 mg/cm<sup>2</sup> level.* Comments were diverse regarding the use of the 0.7 mg/cm<sup>2</sup> lead-detection level. HUD had proposed to use this level based on the recommendations of CDC. One

commenter was not satisfied that the XRF will clearly read down to 0.7 mg/cm<sup>2</sup> level. The Housing Authority of the City of Milwaukee stated that XRFs are not reliable below 1 mg/cm<sup>2</sup> and therefore the 0.7 mg/cm<sup>2</sup> level would require other test procedures. Princeton Gamma-Tech, a manufacturer of an XRF, advised that the precision (1 sigma) of a single reading of their Model XK-3 is  $\pm 0.35$  mg/cm<sup>2</sup>. To achieve a precision of  $\pm 0.2$  mg/cm<sup>2</sup> on a given spot, at least three readings on that spot are required. The manufacturer further noted that improvement in reading precision on a spot varies with the square root of the number of readings taken on that spot. The statistical variations which necessitate the multiple readings for increased precision result from the physical laws which govern the x-ray fluorescence process and have nothing to do with the instrument itself. Based on its experience, one state department of health stated that to obtain reliable readings at the 0.7 mg/cm<sup>2</sup> level, approximately eight readings must be taken on each surface and then averaged. One commenter noted that the detection level greatly influences the cost. When Philadelphia switched from 2.0 mg/cm<sup>2</sup> to 0.7 mg/cm<sup>2</sup>, the number of surfaces to be abated increased by a third. A conservative reading level erring on the side of caution was suggested. Two commenters suggested the detection level should be reduced to 0.1 mg/cm<sup>2</sup>. Another commenter noted if HUD chooses the 0.7 mg/cm<sup>2</sup> level, enormous sums may be spent on incomplete abatement.

*iii. Operation of the XRF.* Three commenters suggested that XRF readings may be unreliable because of operational factors. One of these commenters suggested the use of a uniform training program and a technical resource center. One commenter further stated that quality control guidelines should be established regarding the use of XRFs. Improper use of an XRF on sculpted surfaces, surfaces with peeling paint, soil or dust on floors, or multi-paint layers may lead to erroneous results. The Housing Authority of the City of Milwaukee noted from experience that XRFs are not reliable on rough or curved surfaces and other test methods are required at these locations. Another commenter suggested that readings will vary with the height of the inspector, and inspectors can become weary of the process and start to generalize greatly. Therefore, it is important to take an average of several readings of a given item and to pay a unit fee to a local public health agency



to keep the process objective and above reproach. CDC stated that HUD must use the best technology available, with rigorous quality control measures, in order not only to meet objectives of abatement but to conserve resources.

iv. *State of technology.* One commenter believed the technology behind the XRFs was highly unreliable. Georgia Tech Research Institute suggested that an independent evaluation of the two currently available XRF instruments should be undertaken prior to initiation of a national program for lead-paint hazard abatement. This evaluation should follow procedures defined by the NBS as reported in NBSIR-73-231 and NBSIR 78-1466. The physical principle of x-ray excitation is identical in both instruments, however, they use different detection methods. One instrument uses a scintillation method, the other a proportional counter. There are trade-offs to be considered in both detection methods. In the 1978 evaluation, an instrument utilizing a scintillation detection method was found to be too imprecise and inaccurate to be recommended for use by NBS. In any analytical measurement certain limitations apply due to fundamental physical and chemical principles. An on-board computer provides for an easier way of dealing with these limitations but does not change the physics of the measurement. Reliability and performance standards for all instruments to be used need to be documented prior to the onset of a program such as this one. In addition, performance standards for lead testing should be established and should be independent of the analysis method used. They also noted that recent technology advances may be directly transferable to lead detection. Development of hand-held spectrophotometers may allow for quantitative chemical analysis of lead in the field. It was not suggested that a research and development program be undertaken but rather an evaluation of existing technology applicable to lead detection which may result in a substantial cost reduction over the course of the entire detection and abatement program. Simple "color change" sodium sulfide tests to indicate the presence/absence of lead may be ambiguous; some numerical indication of lead concentration is necessary.

v. *Availability of the XRF.* Several commenters remarked that the availability of the XRFs would pose a problem in an undertaking this large. They stated that XRFs are not widely available locally from other agencies or units of government. A very large PHA

might be able to afford to buy its own. Without additional funding from HUD, most medium-sized and smaller PHAs will not be able to afford to buy the XRFs.

vi. *Safety concerns.* Concerns were expressed about the cobalt radiation in using the XRF. XRF operators in New York City are required to wear badges that indicate the amount of radiation absorption. Many PHA employees are fearful to operate the XRF or carry a "hi-tech" and expensive machine into public housing developments because in some cases it may also invite assault if they are unaccompanied. The use of this machine may constitute an unnecessary potential health hazard to employees and occupants.

vii. *Other.* One commenter suggested that it would be extremely helpful if the Consolidated Supply Program could solicit proposals for testing services.

b. *Random Testing.* Five commenters expressed concerns regarding the proposed random testing procedures. One commenter considered the proposal to be infeasible because of the number of units and because many are scattered single family houses of varying ages. To reach the 95% degree of reliability in testing paint, some PHAs would have to test almost every one of their dwelling units and incur very high costs. The CLPHA also questioned whether it would be necessary to inspect every unit in a development where it is found that there is some lead-based paint. If an abatement program is instituted, it is likely to cover all the units in a development, and preliminary inspection of each one of the units individually would not be required. To avoid this high degree of testing, a PHA suggested a brief notice to all public housing residents warning them of the possible hazard of lead poisoning because it is more important that the PHA have the HUD funds to correct these lead-based paint conditions than to conduct a thorough testing program. One commenter applauded HUD's random sampling approach which requires sampling of all public housing but noted the proposal is both too broad and too narrow. It is too narrow because it omits random sampling of soils in play areas and in areas directly adjacent to buildings with exterior lead paint. The testing proposal is too narrow also because it does not require testing of all intact paint and testing of elderly housing. Young children visit elderly housing and repeated exposures from these visits can cause poisoning. The testing proposal is too broad in that testing on a project basis may overlook entire buildings where dangerous levels

of lead are present. An alternative scheme would be to choose samples on the basis of the number of buildings and number of units within a project.

A PHA suggested an alternative to a mandated time frame is to incorporate testing and abatement procedures, where no EBLs in children exist, into two ongoing processes: Normal vacancy preparation and modernization under CIAP. If isolated incidents of a child living in a public housing unit testing positive for blood lead occur, then the family can be relocated if the paint in the unit or the common area is at fault and abatement can proceed immediately. The PHA further indicated that although testing is impracticable depending on the availability of the XRF operated by their state CLPPP for extensive testing, program personnel have indicated that random testing using their XRF is feasible. Another PHA suggested that it should be permitted to substitute a sub-sample of additional apartments in each of the project buildings, which should be adequate to confirm the existence of hazardous lead-based paint. Paint specifications for their projects constructed during the critical years of lead-based paint usage were the same for the entire development. Therefore, if a sample and sub-sample show positive readings, they would have to assume the existence of hazardous lead-based paint throughout the entire project.

c. *Other Surfaces and Areas to Test.* Three commenters suggested that HUD should test exteriors above five feet, revise its definitions of chewable surfaces, defective lead-based paint (which only addresses short term hazards) and applicable surfaces (to include exterior walls). One commenter further added that units must be re-tested and re-treated any time a potential hazard becomes an immediate hazard. A PHA suggested that testing should be required on all surfaces in all units in projects that were not constructed at the same time or constructed under separate contracts under the random selection process.

d. *Priorities for EBLs.* Three commenters agreed with HUD that whenever a child with an EBL is identified, testing of those units (and possibly the EBL building) should be a priority.

e. *Housing Approach.* Two commenters commended HUD for taking primarily a housing approach to the elimination of lead-based paint poisoning in public housing. One commenter stated HUD had no legal choice but to use the housing approach.



Given these comments regarding miscellaneous testing procedures, the testing and abatement standard will be 1.0 mg/cm<sup>2</sup> using an XRF. HUD has selected the 1.0 mg/cm<sup>2</sup> level for several reasons. The 1.0 mg/cm<sup>2</sup> level provides for an adequate margin of safety between abatement levels and levels that have been demonstrated to be dangerous because they are often associated with EBLs. Research by Gilbert, et al. (1979) found that median paint lead levels in the homes of children with EBLs were about 10 mg/cm<sup>2</sup> for interior surfaces and 16 to 20 mg/cm<sup>2</sup> for exterior surfaces. Control subjects, without EBLs, lived in houses in which paint lead was generally less than 1.0 mg/cm<sup>2</sup>, except for some exterior surfaces. Research by Reece, et al. (1972) found that children with EBLs lived in housing with lead content averaging between 4 mg/cm<sup>2</sup> and 8 mg/cm<sup>2</sup> on interior surfaces and between 10 mg/cm<sup>2</sup> and 17 mg/cm<sup>2</sup> on exterior surfaces. The 1.0 mg/cm<sup>2</sup> level is within the range of 0.7 mg/cm<sup>2</sup> to 2 mg/cm<sup>2</sup> typically used as abatement standards by local CLPPPs. One of the two available XRFs, the XK-3, was designed to a contract specification of 1.0 mg/cm<sup>2</sup>. Tests by the National Bureau of Standards (NBS) (1978) showed that the XK-3 was sensitive to lead at that level, although the accuracy was not as good as specified in the contract. The NBS did not thoroughly test the XK-3 for sensitivity or accuracy at lead concentrations of 0.7 mg/cm<sup>2</sup>. The manufacturer of the other available XRF, the Microlead I, has stated that the machine more than meets these requirements. Thus, the testing and abatement standard can be met adequately using either of the available detection instruments. Laboratory chemical analysis may be used if approved by HUD in cases where it is not practical to obtain XRF readings. For a fuller discussion of the testing requirements of the Public Housing program, see Section IV. B below.

### C. Abatement

Although HUD did not pose any specific questions regarding its proposed requirements for abatement, eighteen commenters commented on the proposed requirements. These comments have been grouped into ten categories: (1) General Programmatic Concerns; (2) Surfaces to Abate; (3) Abatement Timeframe; (4) Methods of Abating; (5) Abatement Hazards; (6) Abatement Priorities; (7) Cost of Abatement; (8) Emergency Intervention Actions; (9) Effect on Modernization; and (10) Relocation.

1. *General Programmatic Concerns.* Three commenters expressed general concerns about an abatement program and offered design suggestions. It was suggested that abatement of large numbers of dwellings requires necessary controls, otherwise more lead related problems can result. Another commenter indicated that lessons learned from asbestos abatement need to be applied to the problems of lead-based paint hazard abatement. A set of guidelines needs to be established to allow HUD to properly write and oversee specifications with which abatement contractors must comply. Where abatement of the hazard does not result in paint removal but relies on encapsulation or cover-up, education and maintenance programs need to be established. One commenter considered the removal precautions in the proposed rule to be adequate. Enforcement of these precautions is a concern. A system of frequent inspections during each abatement project will be needed to ensure that the precautions are being followed. A requirement for testing and certification of all lead abatement contractors should be considered.

2. *Surfaces to Abate.* Seven commenters suggested that HUD should reconsider the surfaces to be abated. Four commenters suggested an expansion of surfaces to be treated to include: All painted surfaces, including intact non-chewable interior and exterior surfaces and soils; applicable surfaces including walls and exterior surfaces if they are defective or chewable; and surfaces in elderly units and other potential hazards which become immediate hazards after the abatement contemplated by the proposed rule. One commenter suggested that the requirement that lead-based paint be removed from all accessible walls without regard for the soundness or lack of peeling is impractical and further added that PHA personnel should make an assessment of the presence of lead-based paint and whether there is sufficient documentation for it being ingested by an occupant of the unit. One PHA noted that the presence of children under seven years of age should not be part of the criteria for determination of the need for abatement considering unit turnover. One commenter suggested that the definition of defective paint in 24 CFR § 35.22 should specify a lead content of 0.7 mg/cm<sup>2</sup>.

3. *Abatement Timeframe.* Eight commenters expressed concerns about the proposed five-year timeframe for abatement in public housing. Two commenters suggested longer or more

flexible timeframes. Two commenters recommended a five-year deadline for complete lead abatement in public housing and indicated that the proposed rule was defective for not specifying a timeframe and a requirement for one-time abatement. Two commenters indicated that testing and elimination should be completed in substantially fewer than seven years and lack of funding should not excuse compliance. Two commenters indicated that the nineteen day timeframe for testing and abatement in cases of EBLs is impracticable given the restricted time period allowed for locating and contracting for testing and arranging for abatement including relocation of the family.

4. *Methods of Abatement.* Eight commenters commented on the proposed methods of abatement. One commenter stated that the abatement methodology involving covering or removal was not practicable. Two commenters commended HUD on not prescribing the use of any specific methods for lead-based paint removal and supported a performance based standard for clean-up and abatement rather than a design standard. One commenter mentioned that newer approaches to abatement are developing but remain to be fully validated.

Three commenters expressed comments on coverings used for abatement. One commenter asked if the list of coverings for walls was inclusive and suggested that the list should be expanded to include the installation of heavy vinyl wall covering or plaster impregnated cloth because of their studies of these materials. One commenter proposed that protruding corner walls be covered with protective vinyl corner moulding and that window sills and casings be clad with vinyl corner mouldings because this would be more cost effective and less time-consuming. Another commenter stated that the covering of walls in their entirety would be satisfactory provided that the old walls are well-sealed. They further supported removal of all paint from both flaking, peeling surfaces and chewable surfaces and removal of all paint from all accessible, intact surfaces because any other alternative would provide only temporary partial abatement.

Four commenters were concerned about removal methods. A contractor indicated that doing only chewable areas (e.g., four inches in from the edge of the door and up to five feet) adds to the expense of repainting. Adjacent paint to the chewable edge tends to blister with the heat and there is no way



to effectively stop it without completing the entire item. However, doing all leaded surfaces increases the expense of abatement by a factor of three or four over the cost of treating only chewable areas, depending on variables. The contractor also suggested using open flame heat methods because nonflame heat elements triple the cost and the devices break down often, vacant units may not have electricity to operate them and labor time increases. According to studies by the Philadelphia Department of Health, the use of open flame heat guns in the 700°-750° range does not produce toxic fumes. Chemicals are more expensive and create a splash hazard. The contractor recognized that the open flame burning technique creates a greater fire risk and creates more dust and smoke than other techniques, but this must be weighed against the fact that three times more units can be deleaded for the same dollar. It was also noted that occupants must be out of the house during this process unless they wear a mask and some local fire ordinances forbid open flame methods or restrict them to exterior areas or single family dwellings.

Two commenters recommended that on chewable surfaces (usually woodwork such as baseboards, windowsills, door frames, etc.) the abatement method of choice is removal of the affected wood and its replacement with new wood as appropriate for the underlying condition of the wood. This method was recommended because: (1) It creates the least inconvenience and hazard for the tenant and workman; (2) chips and paint dust generated by this method are minimal; (3) no lead residue remains; and (4) although this method is more costly, the use of abrasives, heat or chemical paint removers are objectionable because of the amounts of fumes and/or dust created.

**5. Abatement Hazards.** Five commenters expressed concern regarding the hazard created by abatement and noted preventive measures. Three commenters were concerned about the hazards of lead dust and suggested alternative methodology. High efficiency particulate air filtered vacuums should be used in cleanup because home or industrial type non-filtered vacuums tend to expel fine particles in the air which are then deposited over the entire house. Wet-scrubbing should include the use of high phosphate detergents. Lead dust monitoring using the wet-wipe method should be considered as a quality control measure. Pre and post monitoring of the lead bearing dust will

determine when abatement and cleanup has been completed successfully. At least one incident of lead poisoning in a Baltimore child was the result of improper lead abatement. A commenter noted that household dust lead levels are one of the best predictors of lead absorption in very young children. They recommended that the removal of lead-based paint hazards in public housing should be judged satisfactory only when household dust levels are reduced to levels which do not pose undue risks as found in modern suburban housing free of paints containing lead additives. A state department of health was concerned about contamination of interior spaces with lead in dust due to removal by scraping and sanding and by careless removal procedures. They suggested there may be less health risk in leaving leaded paint on interior surfaces that are not defective and not chewable than in removing it. The proposed rule indicated that the PHA shall dispose of lead-based paint debris in accordance with applicable local, state, or Federal requirements. A state department of health indicated that such requirements are difficult or impossible to find and that locations of hazardous waste landfills are equally as difficult to find.

**6. Abatement Priorities.** Five commenters made suggestions on abatement priorities. One commenter suggested HUD may appropriately prioritize or target certain housing units for deleading, but it must apply to all housing within the authority of HUD on a one time basis. One PHA recommended that Group 1 priorities include testing and abatement as part of the normal vacancy preparation cycle, or as part of a "genuine CIAP modernization program", or as part of a separate federally funded program dealing specifically with lead-based paint testing and abatement. Additional levels of priority for testing and abatement need to be established to stagger the enormous dollar amount required to comply with the proposed rule.

Three commenters addressed needs for EBL priorities. One PHA commented that since neither HUD nor the PHA is going to pay for testing EBLs, it is sensible that testing and abatement would be accomplished when the EBL is reported. A very costly testing program before an EBL is reported will not eliminate additional testing and necessary abatement when a child with EBL is found. Another commenter stated that whenever EBLs are identified by a health source, testing and abatement of the unit, and probably the building

should be accomplished. One commenter noted that the proposed abatement program appropriately carries forward the priorities established in HUD's testing program. When there are limited resources, it is necessary to concentrate on those units and projects where children with EBLs have already been identified.

**7. Costs of Abatement.** Eight commenters responded to HUD's projections on costs of abatement (\$1,100 per unit). Commenters noted that lead abatement is a labor intensive process in regard to total cost especially given Davis-Bacon wage rates. Half of the chewable areas will be doors and windows. Therefore, costs will vary between apartments, semi-detached and single homes. One third of the chewable items are kitchen cabinets, shelving, stairway posts, rails and spindles. The exterior accounts for the remainder and can easily equal fifty percent of the cost if a porch and yard fence are included. It is cheaper to throw away a fence rather than delead it. If a house has painted radiators, the number of chewable surfaces will increase by a third and metal surfaces, such as radiators, must be treated chemically. It was suggested that vacant units should be given high priority because they are the safest, most convenient and cheapest units to abate. Costs can increase by fifty percent due to potential damage claims, moving and scheduling problems with occupied units. One commenter also added that use of high efficiency particulate air filtered vacuums and wet-scrubbing methods will increase the effectiveness of abatement while adding little to the overall costs. Commenters gave estimated costs of abatement which ranged between \$1,000 to \$4,400 per dwelling unit.

**8. Emergency Intervention Actions.** One commenter suggested that the proposed rule regarding EBLs and emergency intervention actions should be supplemented by a requirement that, whether or not funding sources are immediately available, the child must be relocated to a lead-free housing unit until abatement is completed. The proposed emergency intervention actions increase rather than decrease, the risk to the child by increasing the amount of lead dust in the unit.

**9. Effect on Modernization.** Two commenters addressed the issue of recently completed or ongoing Comprehensive Improvement Assistance Program (CIAP) modernization work. It was suggested that if HUD is proposing to dismantle newly completed work which includes intact paint or other wallcovering, a



substantial amount of work will be wasted and dollars lost. Another commenter recommended that approvals of these ongoing programs could be a legitimate reason for an indefinite extension of programs to avoid recapture of funds.

10. *Relocation.* Seven commenters raised the need for relocation during abatement. All commenters suggested relocation was needed and some also noted that some provision should be made to relocate tenants to safe housing until funds become available and the unit is abated. Relocation during abatement is a much larger problem than contemplated by the regulations. It may not be possible for the household to occupy the unit during deleading operations and vacant units may not be available. Commercial accommodations may be necessary. Funding will be necessary for relocation and this also suggests the need for a new and separately funded HUD program. One commenter recommended that removal of lead-based paint be carried out only in vacant units. One commenter noted that relocation of tenants adds to the cost and difficulty and consequently distorts other necessary ongoing repair. One PHA indicated that relocation of tenants is needed during abatement, but noted that if extensive numbers of apartments need to be treated, it will be difficult to rehouse the families because of the severe housing shortage and limited number of vacant apartments.

Abatement methods to be used for defective paint surfaces, chewable surfaces, which contain lead-based paint, and defective lead-based paint surfaces shall consist of suitable coverings, removal, scraping, non-flame heat and chemicals. Sanding and open-flame heat removal techniques on lead surfaces are not recommended because of associated health hazards. (These methods will be permitted only on a limited exception basis where other methods are not feasible.) PHAs will be required to relocate families when necessary during abatement in order to mitigate possible health hazards arising from the abatement process, except when abatement is accomplished by removal of woodwork or covering of walls or woodwork. Abatement of exteriors and common areas where EBLs are involved will be done as considered necessary and appropriate by the PHA and HUD and will be eligible for emergency modernization funds. HUD also recognizes that despite the public housing study which indicated per unit abatement costs of \$1,100, the consensus of comments places the figure higher. For a fuller

discussion of the abatement requirements of the Public Housing program, see Section IV. C below.

#### *D. Funding*

Fourteen commenters mentioned funding concerns. Five commenters suggested the proposed requirements were too costly. Ten commenters suggested special set aside funding measures. It was suggested that three hundred to four hundred million dollars should be set-aside for the purpose of testing, treating and eliminating lead-based paint, and that any current CIAP funding should be refunded by the set-aside to accomplish work items deleted under CIAP.

The CLPHA and other commenters stated that HUD's proposal that all PHA housing be inspected, tested and deleaded without any new source of funding is impracticable and unworkable. They added that the operating budgets of PHAs are already fully committed to the regular, ongoing operations of the PHAs. The operating budget of PHAs is not the place for an extensive lead elimination program. No state or local funding sources are adequate to cover these expenses. This major nationwide program should not be part of CIAP. The total costs of the program could easily be \$750 million. Even if Congress provides \$700 million per year in contract authority, the program over a period of years could consume 20 percent of each year's CIAP funding. The purpose of the CIAP program is comprehensive modernization and additional funding priorities should not be added. CLPHA stated that HUD should ask Congress for a separate appropriation for lead elimination and some of this funding should be earmarked for research and development into less costly inspection, testing and abatement procedures.

One commenter stated that by attempting to rely on state and local programs and CLPPs, HUD would be effectively taking resources away from cases with confirmed EBLs. HUD should provide the funding and seek advice and training from the CLPPs. Additionally, by including only those abatement situations where a child has an EBL as the first priority, HUD is effectively reverting to the "health approach" in funding the proposal. Abatement of an identified lead hazard should not be relegated to the "Group 2" category where it would be subjected to a cost benefit analysis along with other modernization needs. HUD should set aside a special fund for this program. The use of CIAP funds should then be used to supplement that fund in emergency situations.

One commenter proposed that abatement funding be placed in an emergency category after testing has identified any units other than elderly as having a lead paint hazard. Commenters suggested that HUD's funding proposals were "subject to availability of funds" and therefore abusive to the extent that they permit any CIAP funds to be diverted to the correction of conditions in a public housing project that do not pose an immediate hazard to tenants and their children. Additionally, all detection and elimination of immediate hazards should be eligible for Group 1 funding. All detection and elimination of potential hazards should be eligible for Group 2 funding. If hazard elimination remains a Group 2 priority, then the regulations should provide that the Secretary will give priority to lead-based paint hazard abatement.

HUD continues to encourage use of state and local funds for testing and abatement. In response to the comments, HUD has determined that testing and abatement of EBL units and PHA owned or operated child care facilities used by EBL children will be an eligible funding activity under emergency modernization. Testing and abatement of exteriors and common areas will be done as considered necessary and appropriate by the PHA and HUD and will be eligible for emergency modernization where EBLs are involved. Where lead-based paint testing or abatement is undertaken as part of comprehensive modernization, it may be eligible for Group 2 or 3 funding depending on the nature of the project. See also section IV. C.

#### *E. Notification*

Six commenters provided comments on the notification requirements of the proposed rule. One commenter suggested that a notice of lead-based paint hazards may cause unnecessary alarm to public housing residents. It would create a fairly substantial administrative problem to require the PHA to collect certifications from all tenants. It was recommended that notices and certifications be a routine part of the admissions and annual recertification processes and provided to new residents. The notices should advise residents to contact the PHA about loose, peeling, scaling, chipping or falling paint. Notification should be required in cases where the presence of lead-based paint in a public housing unit or common area is determined to be the cause of an EBL in a resident child. Another commenter stated that HUD should set minimum requirements to be included in the notice including the



hazards of lead-based paint, the hazards associated with abatement procedures and recommendations for screening of children. A separate notice should be required at the time of abatement and should mention precautions to be taken. Notices could be tailored to the specific area in which a project is located and should be multi-lingual, if necessary.

One commenter suggested that HUD should publish a form of the proposed notice for review. The notices should alert parents to the possibility of lead-based paint poisoning in places other than their dwelling units, advise tenants of their right to have their units and units frequented by their children tested for the presence of lead-based paint, and alert parents to the danger of chewable surfaces. Notices should be distributed to all new and existing public and Indian housing tenants, including elderly, within six months of the final publication date of the public and Indian Housing rule.

One PHA agreed that all tenants living in projects constructed prior to 1978 should be notified of the potential hazards of lead-based paint, the symptoms and treatment of lead poisoning. From its experience, evidence of receipt can be obtained by certified mail—return receipt requested or tenant written acknowledgements. However, certified mail is not effective for many reasons (e.g., tenants refuse to pick up letters, and extensive staff follow-up is required). Tenants also often refuse to provide written acknowledgement of notices. It was proposed that PHAs only be required to certify that tenants have been notified. An effective method would include individual letters sent by first class mail to each tenant family in projects affected, posters prominently posted in management offices, community, child care and health centers, announcements in their housing authority journal and project newsletters and notices in new leases.

Based on these comments, HUD will require PHAs to certify that tenants (including incoming tenants) have been personally and directly notified as to potential lead hazards and the availability and advisability of blood lead level screening for children under seven years of age. Flexibility in the method of notification will be permitted. A certified mail procedure will not be required because it represents an unnecessary expense.

#### F. Monitoring and Enforcement

Three commenters offered monitoring and enforcement comments. They indicated that the monitoring and enforcement requirements are insufficient because they do not go

beyond what is already established for HUD's other programs and that HUD has not identified any specific steps it will take. It was suggested that HUD should create a unit of trained personnel to monitor compliance with its regulations and assist PHAs in their compliance efforts. HUD should also condition the grant of all CIAP funds on the existence of an approved plan to comply with the lead-based paint regulations within the time allowed. One PHA noted that the enormity of the program makes monitoring for compliance impracticable.

In response to these comments, HUD plans to modify its PIH Field Monitoring Handbook (7460.7 REV.) and CIAP Handbook (7485.1 REV-2) to reflect specific lead-based paint testing/abatement monitoring and performance review objectives. On-site HUD inspections of PHAs will incorporate review of lead-based paint testing/abatement performance.

### III. Recent Studies of the Lead-Poisoning Problem

#### A. Public Housing Study

HUD completed a research study with Abt Associates to provide an estimate of the incidence and condition of lead-based paint in public housing units and common areas and an estimate of the cost of abatement under different regulatory program approaches. This research was part of a larger contract to determine modernization needs in public and Indian housing. In this study, the Department requested CLPPPs to assist in data collection by visiting five randomly selected local public housing projects (in areas with less than five local public housing projects, all projects were inspected) and inspecting them for the presence of lead paint. A total of 34 local programs visited 131 public housing projects and 262 units to test for the presence of lead-based paint. The programs used XRFs to test units, common areas such as halls, and site-wide facilities for the presence of leaded paint, and the amount of lead. The local inspectors also reported whether the paint was in good condition or defective (e.g., peeling or chipping).

Because prior research led the researchers to expect a higher proportion of lead-based paint hazards in the oldest project, the analysts split the sample into four age strata and obtained inspections in a larger number of older projects than new projects. Using a standard of 1.0 mg/cm<sup>2</sup> lead on chewable surfaces accessible to children or in defective paint on flat surfaces such as walls or ceilings, data shows immediate hazards in 69% of the

sample units built in 1950 and before, 48% of units built between 1951 and 1959, 44% of units built between 1960 and 1977, and only 7% of units built between 1978 and 1983. Analysis of the units inspected that were built in 1978 or later showed only 1 of the 15 sampled units with leaded paint, and none of 15 units had any defective lead-based paint. Also in the post 1977 units that did have some lead-based paint, the lead was found to be at a relatively low level, marginally over the 1.0 mg/cm<sup>2</sup> standard. These findings were expected because it became illegal to sell paint with significant amounts of lead starting in 1977.

#### B. EPA Air Quality Criteria for Lead

EPA's Air Quality Criteria for Lead evaluates and assesses scientific information on the health and welfare effects associated with exposure to various concentrations of lead in ambient air. The documentation considers all sources of lead including lead-based paint. Because of recent papers and scientific literature concerning the relationship between blood lead levels and blood pressure, EPA made available for public comment a draft addendum to the draft revised criteria document (February 11, 1986, 51 FR 5100). At the time of publication of this final rule, the criteria document and addendum are still under review.

### IV. Requirements for Public and Indian Housing's Program

This rule amends the structure of the regulations implementing the LPPPA. It amends the Public and Indian Housing Lead-Based Paint Poisoning Prevention program and provides minimum requirements for other HUD programs. Part 35 has been amended to state generally applicable minimum requirements but authorizes Assistant Secretaries to promulgate program-specific regulations which supersede the general inspection and hazard elimination requirements of Subpart C of 24 CFR Part 35. This rule supersedes Subpart C of Part 35, integrates the lead-based paint requirements into the administrative and operational structures of public and Indian housing and allows for "practicability" determinations to be based on specific program circumstances. The practicability standard required by the LPPPA and as interpreted in the *Ashton* decision has been discussed at length in the proposed rules for Public and Indian Housing (51 FR 5667) and Insured and Assisted Housing (51 FR 24118). After a discussion of the construction cut-off dates, the lead-based paint public and



Indian housing program requirements will be discussed along with practicability determinations.

#### A. Construction Cut-Off Dates

Both proposed rules for Public and Indian Housing (51 FR 5669) and Insured and Assisted Housing (51 FR 24115) discussed the issue of construction cut-off dates in the LPPPA, the current rule and the ANPR. Several comments were received in response to the question on construction cut-off dates in the proposed rule for public and Indian housing. See Section II.A. above. HUD has decided not to use construction cut-off dates for testing and necessary abatement involving children with EBLs because of the health hazard involved. In cases where PHAs are applying for comprehensive modernization projects or are currently in the process of a comprehensive modernization project involving the breaking of painted surfaces, HUD has decided that the comprehensive modernization requirements apply to projects constructed or substantially rehabilitated before 1973, or constructed or substantially rehabilitated between 1973 and 1978 but not subject at such time to HUD's then current lead-based paint regulations. HUD is using 1973 as the initial cut-off date because it is inappropriate to impose testing and abatement requirements based on the assumption of noncompliance with Federal regulations. The choice of 1978 as a cut-off date is based on findings in the public housing study. See Section III.A. The public and Indian housing maintenance requirement for defective paint adopts the 1978 construction cut-off date found in new Subpart C of Part 35. The public and Indian housing notification requirement adopts the new 1978 construction cut-off date in Subpart A of Part 35.

#### B. Inspection and Testing

HUD is requiring inspection for defective paint surfaces. This requirement is a remnant of the current Part 35. Section 965.704 provides that in family projects constructed prior to 1978, the PHA shall inspect units for defective paint surfaces (a visual inspection and no requirement for testing of lead content): (1) At unit turnover when the incoming household includes a member seven years of age or under, and (2) as part of routine periodic unit inspections. If defective paint surfaces are found, covering or removal of the defective paint spots as described in § 35.24(b)(2) shall be required. Treatment shall be completed before occupancy in the case of unit turnover and within a reasonable period of time when discovered as part

of routine periodic unit inspections. The costs of this abatement will be paid out of the PHA's operating budget.

Testing procedures in new Section 965, Subpart H are initiated upon identification of an EBL child. Section 965.705(a) requires when a child residing in a PHA-owned low income public housing project has been identified as having an EBL, the PHA to test all chewable surfaces and defective paint surfaces in the unit and in PHA owned and operated child care facilities used by the EBL child for lead-based paint. The PHA may also test non-chewable applicable surfaces. Testing of exteriors and common areas (including PHA non-dwelling facilities which are commonly used by children) will be done as considered necessary and appropriate by the PHA and HUD. Instead of testing, the PHA may transfer the family with an EBL child to a post-1978 or previously tested or treated unit. Similar procedures in § 965.705(b) apply when an applicant family has a child with an identified EBL.

Tenants are encouraged by PHAs through the notification process in § 965.703 to have all children under seven years of age who reside in pre-1978 units or are members of applicant families tested for EBLs. HUD believes there are adequate resources for the necessary blood lead screening (CLPPPs, state and local health departments, private health professionals and Medicaid-assisted screening). To avoid unnecessary retesting, PHAs are required to maintain records of which units, PHA child care facilities, common areas and exteriors are tested and the results of the testing and the condition of the painted surfaces by location.

Under the new comprehensive modernization requirements, PHAs will be required in certain cases to test for lead-based paint on a random basis. For ongoing comprehensive modernization projects which involve the breaking of a painted surface (e.g., replacement of kitchen cabinets), no construction contracts (excluding those solely for emergency work items) shall be executed until random testing has taken place and any necessary abatement is included in the modernization budget. The same random testing requirements apply to applications for comprehensive modernization projects.

Based upon public comment and available research, the testing standard will be 1.0 mg/cm<sup>2</sup>. Testing to more stringent standards is permitted if required by state or local law. PHAs are required to certify that they have complied with state or local

requirements. The PHA shall maintain records which support this certification. PHAs are encouraged to first use state and local sources for testing. Testing utilizing the XRF will be an allowable modernization cost. The additional cost of using laboratory chemical analysis will be allowable under CIAP only where approved by HUD in cases where it is not practical to obtain XRF readings.

HUD believes these testing requirements will lead to eliminating as far as practicable immediate hazards due to the presence of paint which may contain lead and to which children may be exposed. The testing requirements employ reasonably available techniques for eliminating the hazard. The state of art of testing for lead content in paint is currently limited to laboratory chemical analysis or portable XRFs. Portable XRFs are recommended by CDC, and are less costly than laboratory chemical analysis. Laboratory chemical analysis is discouraged because there is no direct equivalence between this type of analysis and the readings given by the XRFs. Lead paint analysis by laboratory chemical analysis also takes longer than by use of an XRF. The XRF provides immediate readings. In the laboratory chemical analysis approach, it is estimated that thirty to forty samples can be analyzed per day at a cost of \$12 per sample in a public laboratory. Typically, six to eight samples are taken per room to test for lead paint using the laboratory chemical analysis method. The costs for this service at private laboratories is estimated at \$25 per sample or \$175 per room. The costs of using an XRF is estimated at \$20 per room (taking twenty to twenty-five readings per room) and typically two three-bedroom units can be tested in one day. Two companies are currently manufacturing XRFs. The cost is approximately \$8,000 per machine, and the yearly maintenance is approximately \$2,500.

The number of chemical testing laboratories available throughout the country capable of handling HUD's testing, if required, is limited at best. To HUD's knowledge, there are approximately 400 XRFs in existence throughout the United States to test not only housing in HUD programs but all other private housing. Most of the XRFs, which may or may not be available on a routine basis to test properties participating in HUD programs, are owned by municipalities or organizations affiliated with state or local governments. HUD is also aware that there is substantial downtime in repairing XRFs. The testing which HUD



requires for this rule should increase significantly the demand on these testing resources.

In addition to their limited availability, HUD has other concerns regarding the XRF. HUD received sixteen comments on the XRF in response to the proposed lead-based paint rule to Public and Indian Housing. A majority of commenters suggested readings produced by XRFs are highly inaccurate (e.g., XRFs are reported to read the opposite sides of walls, and to be influenced by lead pipes and other leaded building materials within the walls). Several commenters indicated that XRFs are not accurate at levels below 1.0 mg/cm<sup>2</sup>. Other commenters suggested that XRF readings may be unreliable because of operational factors and suggested the need for a uniform training program, technical resource center and quality control guidelines. It was also suggested that an independent evaluation of the two currently available XRF instruments should be undertaken prior to initiation of a national program for intact paint hazard abatement dependent on the use of such detection equipment. Other commenters were concerned about the effects of cobalt radiation in using the XRF. See Section II.B. above.

The Court of Appeals in *Aston* agreed with the District Court, which stated that the "as far as practicable" standard allows the Department to "consider cost and technical considerations in developing its regulations" and that the threshold of practicability is reached if there exist "reasonably available techniques" for eliminating the hazard. 541 F. Supp. 641.

Based on these comments, recent demonstrations and literature research, HUD has considered a number of testing requirements, and the availability and reliability of testing equipment is a serious practical issue. If HUD proposed more extensive testing of PHA projects, a shortage of testing equipment and competent operators could force PHAs to proceed with abatement measures in many cases where there would be no hazard or force PHAs to chip intact painted surfaces to collect samples for laboratory analysis. It is estimated that hundreds of testing machines would be needed for such an undertaking. The effective availability of the machines would be reduced by the fact that the machines often break down and need new radioactive sources every year. In addition, contractors and PHA staff would have to be trained in the safe operation of these machines. It could affect availability and quality of testing in those units where accurate testing is

of the greatest importance (e.g., EBL children). Cost associated with more extensive testing program would severely curtail program activity. As demonstrated by many PHAs' comments on the proposed public and Indian housing rule, alternative testing procedures could have a serious impact on the CIAP program and cause a disruption in the public and Indian housing program and numerous administrative problems.

Because of the numerous practical problems associated with testing in this program, HUD is requiring testing in § 965, Subpart H only where there is a child with an EBL. HUD believes testing should also be included in comprehensive modernization projects which involve the breaking of painted surfaces.

#### C. Abatement

Section 965.705(d) requires that hazard abatement actions shall be provided to EBL-related structures. The order of abatement and surfaces to be abated are as follows: (1) Units housing (or which will be housing an incoming family which has an EBL child) children identified with EBLs (abatement is required for defective lead-based paint surfaces and chewable surfaces found to contain lead-based paint); (2) PHA owned or operated child care facilities used by children identified with EBLs (abatement is required for defective lead-based paint surfaces and chewable surfaces found to contain lead-based paint); (3) common areas and exterior applicable surfaces of projects in which children with identified blood lead levels reside (if considered necessary and appropriate by the PHA and HUD, abatement is to be provided to defective lead-based paint spots on applicable surfaces other than chewable surfaces and to complete chewable surfaces found to contain lead-based paint).

Similar abatement actions apply in the case of comprehensive modernization projects. Where defective lead-based paint is found on a wall or ceiling surface within a unit or a PHA owned or operated child care facility, the entire wall or ceiling surface shall be treated. If lead-based paint is found on chewable surfaces within a unit, the entire chewable surface shall be treated. In common areas, including exterior surfaces or non-dwelling facilities, and on applicable exterior surfaces, treatment shall be provided to defective lead-based paint spots and to complete chewable surfaces containing defective or intact lead-based paint.

The degree of abatement is based upon the CDC statement, local and state practices, risk to EBLs and

practicability. The degree of abatement varies between interior and exterior surfaces including common areas. In an EBL unit or a PHA-owned or operated child care facility where a defective lead-based surface is found on any portion of a wall or ceiling surface, the entire wall or ceiling would be abated. Treatment of a unit for an applicant family which has an EBL child shall be completed prior to occupancy. Within five days after a resident EBL child has been identified and the PHA notified and before the hazards can be fully abated, the PHA is required to take temporary emergency intervention actions. These actions include removing defective lead-based paint (which is within easy reach of the child) and scrubbing surfaces after such removal with a strong detergent (high-phosphate detergent if permitted under state or local law). Full treatment of a unit housing an EBL child is required within fourteen days after identification of an EBL. The PHA shall request reprogramming of previously approved CIAP funds or apply immediately for emergency modernization funds, if other funding sources are unavailable. For common areas and exterior applicable surfaces of projects, abatement would include all defective spots and chewable surfaces.

A "defective lead-based paint surface" is defined as any paint on applicable surfaces having a lead content greater than or equal to 1.0 mg/cm<sup>2</sup>, that is cracking, scaling, chipping, peeling or loose, and "chewable surface" is defined as all chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g. protruding corners, windowsills and frames, doors and frames, and other protruding woodwork. Defective and intact chewable lead-based paint surfaces are considered, in the statutory phase, "immediate hazards" for EBLs. Other lead painted surfaces are considered potential hazards because of lack of evidence of poisoning from these surfaces.

The methods of abatement are not prescribed but the immediate hazard must be thoroughly removed or covered. Various treatment methods are described in revised § 35.24(b)(2). Covering may be accomplished by such means as adding a layer of gypsum wallboard or a fiberglass cloth barrier to the wall surfaces. Depending on the wall condition, wallpaper (which is permanently attached and not easily strippable) may be used. Covering or replacing trim surfaces is also permitted.



Paint removal may be accomplished by such methods as scraping, heat treatment (infra-red or coil type heat guns) or chemicals. Sanding and the use of propane torches (open-flame methods) are not recommended and will be permitted only on a limited exception basis where other methods are not feasible. Washing and repainting without thorough removal or covering does not constitute hazard abatement. HUD recommends that PHAs consult the CDC guidelines on hazard abatement and that workers performing abatement work comply with OSHA standards (29 CFR Part 1926). HUD is not recommending the use of sanding or propane torches (open-flame heat methods) in abatement because of the additional hazard which is created. Sanding produces the greatest deposits of lead in dust, with rates as high as 10 mg of lead/sq. ft./hour. Open flame methods cause lead to vaporize. HUD stresses the need for thorough cleanup after lead-paint removal. The area should be vacuumed thoroughly and then wetscrubbed with strong detergents (high-phosphate type if permitted by state or local law). PHAs and their contractors shall deposit lead-based paint debris in accordance with all local, state and Federal requirements. When necessary, tenants, especially children with EBLs and pregnant women, should be relocated during abatement in order to mitigate any possible health hazard.

#### D. Funding

If state and local funds are unavailable, PHAs may use federal funds (such as CIAP, section 14 of the United States Housing Act of 1937, 42 U.S.C. 1437). Testing and abatement of EBL units and PHA owned or operated child care facilities used by EBL children will be eligible funding activities under emergency modernization. Testing and abatement of exteriors and common areas considered necessary by the PHA and HUD will also be eligible for emergency modernization funds where EBLs are involved.

The first step in the CIAP funding decision is Preliminary Application. Preliminary Applications are first screened on the basis of such factors as the urgency of the need and the management and modernization capability of the PHA. Lead-based paint needs will be considered among others at this screening. Section 968.5(d) is amended to state that the HUD office shall review the Preliminary Applications. Those selected for Joint Review receive further scrutiny during a HUD on-site review. After Joint Review, HUD decides which PHAs will be

invited to submit Final Applications based upon the funding preferences.

Under CIAP, there are three funding preferences. Group 1 includes projects having emergency conditions that pose an immediate threat (*i.e.*, must be corrected within one year of funding approval) to tenant health or safety (emergency modernization and emergency work under homeownership modernization). Under emergency modernization, funding is limited to correction of emergency conditions and may not be used for substantial rehabilitation. Group 2 includes projects (a) having conditions which threaten tenant health or safety or having a significant number (10 percent or more) of vacant or substandard units, and (B) located in PHAs having demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose and homeownership modernization). Group 3 includes other projects not meeting the criteria of Group 1 or 2 (comprehensive, special purpose and homeownership modernization).

HUD is amending the funding preferences. Testing and abatement of EBL units, common areas and exteriors and PHA-owned or operated child care facilities used by EBL children, would be an eligible activities under Group 1. The PHA may request reprogramming of previously approved CIAP funds or apply immediately for emergency modernization funds, if other funding sources are unavailable.

All other required testing and abatement would be funded under Group 2 or 3 depending on the nature of the project. PHAs with comprehensive modernization programs funded at the time the regulation becomes effective and thereafter must comply with the lead-based paint requirements whenever a painted surface is broken during the rehabilitation. PHAs may not enter into contracts under CIAP for treatment of areas involving the breaking of painted surfaces which could have lead-based paint, other than for testing lead-based paint, until random testing is completed and any necessary abatement is included in the modernization budget.

#### E. Notification

This regulation requires that purchasers and tenants of all HUD-associated housing constructed prior to 1978 and that all applicant families be notified about the hazards of lead-based paint and of the advisability and availability of blood lead level screening for children. HUD is deleting notices (Appendices I and II) from Part 35 to permit the issuance of more program-

specific notices. PHAs are required to certify that tenants have been personally and directly notified as to potential lead hazards but flexibility in the method of notification will be permitted. A certified mail procedure will not be required.

#### F. Monitoring and Enforcement

HUD plans to modify language in the PIH Field Monitoring Handbook (7460.7 REV.) and CIAP Handbook (7485.1 REV-2) to reflect specific lead paint testing/abatement monitoring and performance review objectives. On-site HUD inspections of PHAs will incorporate review of lead testing/abatement procedures performance under this rule.

#### V. Section-by-Section Review of Proposed Regulations

These regulations amend Parts 35, 905, 965 and 968. Each of these amendments are described below.

##### Part 35

In Subpart A, § 35.1 is amended by changing the reference from 1950 to 1978. Definitions of immediate hazard and potential hazard in § 35.3 are deleted. The definition of HUD-associated housing is revised to more accurately reflect section 302 of the LPPPA, and the definition of residential structure is revised to reflect all areas of HUD-associated housing designed for human habitation and commonly used by children under seven years of age. Section 35.5 is amended to refer to the hazards of lead-based paint in HUD-associated housing constructed prior to 1978 and to delete reference to the prescribed text of notices in Appendix I.

In Subpart C, § 35.20 has been revised to more accurately reflect section 302 of the LPPPA. Definitions used only in Subpart C of Part 35 are listed in § 35.22. Section 35.24 has also been amended to limit inspection and abatement treatment prescribed as minimum requirements for all programs to housing constructed prior to 1978, authorize superseding program-specific regulations, and revise treatment methods. Section 35.25, which provides for a lead-based paint clearinghouse in HUD, is deleted. HUD has received little information or suggestions with respect to elimination of lead-based paint hazards through this clearinghouse. Subpart E of Part 35 is amended by simplifying the definitions and amending the requirements in a similar fashion to § 35.24.

##### Part 905

Section 905.107 is amended by adding a specific requirement for lead-based



paint poisoning prevention compliance. Indian Housing Authorities ("IHAs") are also covered by Part 965 as amended herein.

#### Part 965

New Subpart H is added to Part 965 for lead-based paint poisoning prevention. The subject matter of this new subpart is discussed extensively above.

#### Part 968

Section 968.4 is amended by specifically including lead-based testing and abatement as eligible modernization costs. Section 968.5(g)(3) is amended by allowing funding of lead-based paint testing and abatement in one or two stages. The funding preferences in Section 968.5(h) are expanded to include lead-based paint testing and abatement. This rule also revises and expands the funding preferences and the application screening process under CIAP. This section is discussed above in detail in section IV.

#### Other Matters

##### Regulatory Flexibility Act

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. HUD finds that there are not anticompetitive discriminatory aspects of the rule with regard to small entities nor are there any unusual procedures that would need to be complied with by small entities.

##### Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with Part 50 of this title, which implements section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, DC 20410.

##### OMB Control Number

Information collection requirements contained in §§ 965.705(e), 965.706, 968.5(i)(6)(ix) and 968.9(e) of this rule have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3502). See OMB approval 2577-0090.

##### Regulatory Impact Analysis

This rule qualifies as a major rule as defined in Executive Order 12291. The

Department has conducted a cost analysis of the proposed regulations as part of the public and Indian housing modernization needs study. This cost analysis serves as a Regulatory Impact Analysis. The Department interprets the Executive Order to require an analysis of potential costs and cost alternatives without regard to the degree to which cost-effectiveness is an appropriate standard under the applicable statute. The cost study is available from the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. The procedures otherwise required under Executive Order 12291 were not completed as to this rule because of a deadline imposed by judicial order, as described above.

##### Semiannual Agenda of Regulations

This rule was listed as sequence number 793 under the Office of Housing in the Department's Semiannual Agenda of Regulations published on April 21, 1986 (51 FR 14036, 14046) under Executive Order 12291 and the Regulatory Flexibility Act.

##### Note

The following HUD rule is subject to regulatory review by the Director of the Office of Management and Budget under Executive Order 12291, February 17, 1981.

While the cited rules have been submitted to the OMB for review under the Executive Order, that review has not been completed at the time of this publication. It is impracticable for the Department of Housing and Urban Development to follow the procedures of the Executive Order with respect to these rules, because, under orders filed by the United States District Court for the District of Columbia in *Ashton v. Pierce*, Civil Action No. 81-0719 (December 13, 1985 and February 7, 1986), the Department has been directed to publish these rules on or before August 1, 1986.

The Department has to date, and will continue, to adhere to the requirements of Executive Order 12291 to the extent permitted by the judicial deadline.

##### List of Subjects

###### 24 CFR Part 35

Lead poisoning, Reporting and recordkeeping requirements.

###### 24 CFR Part 905

Grant programs: Housing and community development, Grant programs: Indians, Loan programs: Indians, Low and moderate income

housing, Public housing, Homeownership.

###### 24 CFR Part 965

Energy conservation, Loan programs: Housing and community development, Public housing, Utilities.

###### 24 CFR Part 968

Loan programs: Housing and community development, Public housing, Reporting and recordkeeping requirements, Grant programs: Housing and community development, Indians.

Accordingly, 24 CFR Parts 35, 905, 965 and 968 are amended as follows:

### PART 35—LEAD-BASED PAINT POISONING PREVENTION IN CERTAIN RESIDENTIAL STRUCTURES

1. The authority citation for Part 35 is revised to read as set forth below and any citation following any section in Part 35 is removed:

Authority: Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. The Table of Contents for Subparts A and C are revised to read as follows:

#### Subpart A—Notifications to Purchasers and Tenants of HUD-Associated Housing Constructed Prior to 1978 of the Hazards of Lead-Based Paint Poisoning

Sec.  
35.1 Purpose and scope.  
35.3 Definitions.  
35.5 Requirements.

#### Subpart C—Elimination of Lead-Based Paint Hazards in HUD-Associated Housing

35.20 Purpose and scope.  
35.22 Definitions.  
35.24 Requirements.

3. Subpart A is revised to read as follows:

#### Subpart A—Notification to Purchasers and Tenants of HUD-Associated Housing Constructed Prior to 1978 of the Hazards of Lead-Based Paint Poisoning

##### § 35.1 Purpose and scope.

This Subpart A establishes procedures to assure that purchasers and tenants of all HUD-associated housing constructed prior to 1978 are notified of the hazards of lead-based paint which may exist in such housing, of the symptoms and treatment of lead-based paint poisoning, and of the importance and availability of maintenance and removal techniques for eliminating such hazards.



**§ 35.3 Definitions.**

*Act.* The Lead-Based Paint Poisoning Prevention Act, Pub. L. 91-695, 84 Stat. 2078, as amended by Pub. L. 93-151 and Pub. L. 94-317 (42 U.S.C. 4821-4846).

*Assistant Secretaries.* The Assistant Secretaries in the Department of Housing and Urban Development.

*Department of HUD.* The U.S. Department of Housing and Urban Development.

*HUD-associated housing.* Any residential structure that is the subject of an application for mortgage insurance under the National Housing Act or is proposed for the receipt of housing assistance payments under a program administered by the Secretary. For purposes of this Subpart A, "HUD-associated housing" also includes any existing residential structure—

(1) Acquired by the Secretary pursuant to any provision of law which, prior to such acquisition, was insured under the National Housing Act or was subject to a loan under section 312 of the Housing Act of 1964,

(2) Sold by the Secretary following any such acquisition and subject to any requirements regarding its use or operation under an agreement with, or condition imposed by, the Secretary, or

(3) That is currently covered by mortgage insurance or a contract for housing assistance payments.

*Residential structure.* Any house, apartment or structure intended for human habitation, including any non-dwelling facility operated by the owner and commonly used by children under seven years of age, such as a child care center.

*Secretary.* The Secretary of Housing and Urban Development or a HUD official delegated the Secretary's authority with respect to the Act.

**§ 35.5 Requirements.**

(a) Purchasers and tenants of HUD-associated housing constructed prior to 1978 shall be notified:

(1) That the property was constructed prior to 1978;

(2) That the property may contain lead-based paint;

(3) Of the hazards of lead-based paint;

(4) Of the symptoms and treatment of lead-based paint poisoning; and

(5) Of the precautions to be taken to avoid lead-based paint poisoning (including maintenance and removal techniques for eliminating such hazards).

Prospective purchasers or renters shall receive the above notifications prior to purchase or rental.

(b) Each Assistant Secretary shall take necessary actions to implement the requirements of paragraph (a) of this

section with respect to the HUD programs within his/her administrative jurisdiction. Such actions shall include the preparation and prescription of appropriate notices or brochures providing the required information, and the establishment of procedures to:

(1) Provide evidence that the prescribed notification has been received by purchasers and tenants of HUD-associated housing constructed prior to 1978, and

(2) Require the inclusion of appropriate provisions in contracts of sale, rental or management of HUD-associated housing to assure that purchasers and tenants receive the prescribed notification.

4. Subpart C is amended by removing § 35.25 and by revising the remaining sections (§§ 35.20, 35.22 and 35.24) to read as follows:

**Subpart C—Elimination of Lead-Based Paint Hazards in HUD-Associated Housing****§ 35.20 Purpose and scope.**

This Subpart C implements the provisions of section 302 of the Act with respect to establishing procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing HUD-associated housing which may present such hazards.

**§ 35.22 Definitions.**

As used in this subpart:

*Applicable surface* means all exterior surfaces of a residential structure, up to five feet from the floor or ground, such as a wall, stairs, deck, porch, railing, window, or doors, which are readily accessible to children under seven years of age and all interior surfaces of a residential structure.

*Defective paint surface* means an applicable surface on which the paint is cracking, scaling, chipping, peeling, or loose.

*HUD-associated housing* shall have the meaning ascribed in § 35.3.

*Residential structure* shall have the meaning ascribed in § 35.3.

**§ 35.24 Requirements.**

(a) Each Assistant Secretary shall establish procedures with respect to programs involving HUD-associated housing within his or her administrative jurisdiction to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to such housing which may present such hazards.

(b) Subject to the provisions of separate regulations promulgated with respect to any program by the Assistant

Secretary having jurisdiction over such program, the following minimum requirements shall apply to all programs:

(1) All applicable surfaces of HUD-associated housing constructed prior to 1978 shall be inspected to determine whether defective paint surfaces exist. In housing proposed to be assisted with Housing Development Grant funds, the unit of local government or appropriate agency thereof shall be responsible for inspection.

(2) Treatment necessary to eliminate immediate hazards shall, at a minimum, consist of covering or removal of defective paint surfaces found in HUD-associated housing constructed prior to 1978. Covering may be accomplished by such means as adding a layer of gypsum wallboard or a fiberglass cloth barrier to the wall surface. Depending on the wall condition, wallpaper (which is permanently attached and not easily strippable) may be used. Covering or replacing trim surfaces is also permitted. Paint removal may be accomplished by such methods as scraping, heat treatment (infra-red or coil type heat guns) or chemicals. Sanding and use of open-flame methods are not recommended and will be permitted only on a limited exception basis where other methods are not feasible. In the case of defective paint spots, scraping and repainting the defective area is considered adequate treatment. Washing and repainting without thorough removal or covering does not constitute adequate treatment.

(3) Appropriate provisions for the inspection of applicable surfaces and elimination of hazards shall be included in contracts and subcontracts involving HUD-associated housing constructed prior to 1978.

(4) Any requirement of this section shall be deemed superseded by a regulation promulgated by an Assistant Secretary with respect to any program under his or her jurisdiction which states expressly that it is promulgated pursuant to the authorization granted in this section and supersedes, with respect to programs within its defined scope, the requirements prescribed by this section. See, e.g., 24 CFR Part 965, Subpart H (Public and Indian Housing).

5. Section 35.54 is revised to read as follows:

**§ 35.54 Definitions.**

The definitions contained in §§ 35.3 and 35.22 shall apply to this Subpart E. The following definitions are also applicable to this Subpart E:

*Federal agency.* The United States or any executive departments, independent



establishments, administrative agencies and instrumentalities of the United States, including corporations in which all or substantially all of the stock is beneficially owned by the United States or by any of the foregoing departments, establishments, agencies or instrumentalities.

**Federally-owned properties.** Any properties owned by a federal agency as defined in this section.

**Use for residential habitation.** The use of a property as a residential structure as defined in § 35.3.

6. Section 35.56 is amended by revising paragraphs (a) (1), (2), and (3) and removing (a)(4) to read as follows:

#### § 35.56 Requirements.

(a) \* \* \*

(1) All applicable surfaces of residential structures constructed prior to 1978 shall be inspected to determine whether defective paint surfaces exist. For this purpose all defective paint surfaces shall be assumed to be immediate hazards; and

(2) Treatment necessary to eliminate immediate hazards shall consist of covering or removal of defective paint surfaces. Covering may be accomplished by such means as adding a layer of gypsum wallboard or a fiberglass cloth barrier to the wall surface. Depending on the wall condition, wallpaper (which is permanently attached and not easily stripable) may be used. Covering or replacing trim surfaces is also permitted. Paint removal may be accomplished by such methods as scraping, heat treatment (infra-red or coil type heat guns) or chemicals. Sanding and use of open-flame methods are not recommended and will be permitted only on a limited exception basis where other methods are not feasible. Washing and repainting without thorough removal or covering does not constitute adequate treatment.

(3) Prospective purchasers are provided all notifications described in § 35.5(a).

\* \* \*

#### Appendices I and II [Removed]

7. Appendices I and II are removed.

#### PART 905—INDIAN HOUSING

8. The authority citation for Part 905 continues to read as follows:

**Authority:** Secs. 3, 4, 5, 6, 9, 11, 12, and 16, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437b, 1437c, 1437d, 1437g, 1437i, 1437j, 1437n); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

9. Section 905.107 is amended by adding a new paragraph (f) to read as follows:

#### § 905.107 Compliance with other Federal requirements.

(f) **Lead-based paint poisoning prevention.** The IHA shall comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846), Subparts A and B of 24 CFR Part 35, and Subpart H of 24 CFR Part 965, PHA-Owned or Leased Projects—Maintenance and Operation.

#### PART 965—PHA-OWNED OR LEASED PROJECTS—MAINTENANCE AND OPERATION

10. The authority citation for 24 CFR Part 965 is revised to read as set forth below and any citation following any section in Part 965 is removed:

**Authority:** Secs. 2, 3, 6, and 9, United States Housing Act of 1937a, (42 U.S.C. 1437, 1437a, 1437d, and 1437g); Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Subpart H is also issued under Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846).

11. Part 965 is amended by adding a new Subpart H—Lead-Based Paint Poisoning Prevention to read as follows:

#### Subpart H—Lead-Based Paint Poisoning Prevention

Sec.

965.701 Purpose and applicability.

965.702 Definitions.

965.703 Notification.

965.704 Maintenance obligation; defective paint surfaces.

965.705 Procedures involving EBLs.

965.706 Compliance with state and local laws.

965.707 Monitoring and enforcement.

#### Subpart H—Lead-Based Paint Poisoning Prevention

##### § 965.701 Purpose and applicability.

The purpose of this subpart is to implement the provisions of section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4821-4186, by establishing procedures to eliminate as far as practicable the immediate hazards from the presence of paint which may contain lead in PHA/IHA-owned housing assisted under the United States Housing Act of 1937. This subpart applies to PHA-owned low income public housing projects, including Turnkey III, Mutual Help and conveyed Lanham Act and Public Works Administration projects, and to section 23 Leased Housing Bond-Financed projects. This subpart does not apply to projects under the section 23 Leased Housing Non-Bond-Financed Program, the section 10(c) Leased Housing Program, and the section 23 and section 8 Housing Assistance Payments Programs. This subpart is promulgated

pursuant to the authorization granted in 24 CFR 35.24(b)(4) and supersedes, with respect to all housing to which it applies, the requirements prescribed by Subpart C of 24 CFR Part 35.

#### § 965.702 Definitions.

**Applicable surface.** All exterior surfaces of a residential structure, up to five feet from the floor or ground, such as a wall, stairs, deck, porch, railing, window, or doors, which are readily accessible to children under seven years of age and all interior surfaces of a residential structure.

**Chewable surface.** All chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodwork.

**Defective lead-based paint surface.** Paint on applicable surfaces having a lead content of greater than or equal to 1 mg/cm<sup>2</sup>, that is cracking, scaling, chipping, peeling or loose.

**Defective paint surface.** Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

**Elevated blood lead level or EBL.** Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 ug/dl (micrograms of lead per deciliter of whole blood) or greater.

**Family project.** Any project assisted under the U.S. Housing Act of 1937 (other than section 8 or 17 of the Act) which is not an elderly project. For this purpose, an elderly project is one which was designated for occupancy by the elderly at its inception (and has retained that character) or, although not so designated, for which the PHA gives preference in tenant selection (with HUD approval) for all units in the project to elderly families. A building within a mixed-use project which meets these qualifications shall, for purposes of this subpart, be excluded from any family project.

**Lead-based paint.** A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1.0 mg/cm<sup>2</sup>.

#### § 965.703 Notification.

(a) **General.** Tenants in PHA-owned low income public housing projects constructed prior to 1978 shall be notified:

- (1) That the property was constructed prior to 1978;
- (2) That the property may contain lead-based paint;
- (3) Of the hazards of lead-based paint;



(4) Of the symptoms and treatment of lead-based paint poisoning;

(5) Of the precautions to be taken to avoid lead-based paint poisoning (including maintenance and removal techniques for eliminating such hazards); and

(6) Of the advisability and availability of blood lead level screening for children under seven years of age.

Tenants shall be advised to notify the PHA if an EBL condition is identified.

(b) *Applicants.* A notice of the dangers of lead-based paint poisoning and a notice of the advisability and availability of blood lead level screening for children under seven years of age shall be provided to every applicant family at the time of application. The applicant family shall be advised, if screening is utilized and an EBL condition identified, to notify the PHA.

#### **§ 965.704 Maintenance obligation; defective paint surfaces.**

In family projects constructed prior to 1978, the PHA shall inspect units for defective paint surfaces at unit turnover when the incoming household includes a member seven years of age or under, and as part of routine periodic unit inspections. If defective paint surfaces are found, covering or removal of the defective paint spots as described in § 35.24(b)(2) shall be required. Treatment shall be completed before occupancy in the case of unit turnover and within a reasonable period of time when discovered as part of routine periodic unit inspections.

#### **§ 965.705 Procedures involving EBLs.**

(a) *Procedures where a current resident child has an EBL.* When a child residing in a PHA-owned low income public housing project has been identified as having an EBL, the PHA shall: (1) Test all chewable surfaces and defective paint surfaces in the unit or PHA owned and operated child care facilities used by the EBL child for lead-based paint (The PHA may also test the non-chewable applicable surfaces. Testing of exteriors and common areas (including non-dwelling PHA facilities which are commonly used by children under seven years of age) will be done as considered necessary and appropriate by the PHA and HUD) and treat (where positive) the surfaces found to contain lead-based paint or (2) transfer the family with an EBL child to a post-1978 or previously tested or treated unit.

(b) *Procedures for admission of an EBL child.* When an applicant family has a child with an identified EBL, the PHA shall (1) test all chewable surfaces and defective paint surfaces in the unit

assigned for lead-based paint (The PHA may also test the non-chewable applicable surfaces. Testing of exteriors and common areas (including non-dwelling PHA facilities which are commonly used by children under seven years of age) will be done as considered necessary and appropriate by the PHA and HUD) and treat (where positive) the surfaces found to contain lead-based paint or (2) assign the family to a post-1978 unit or a previously tested or treated unit.

(c) *Testing requirements.* Testing of the unit housing the EBL child and the PHA owned or operated child care facilities used by the EBL child shall be completed within five days after notification of the PHA of the identification of the child. Testing of a unit for an applicant family which has an EBL child shall be completed prior to occupancy. Testing services available from state, local or tribal health or housing agencies shall be utilized to the extent available. Testing will be considered an eligible modernization cost under Part 968 only upon PHA certification that testing services are otherwise unavailable. Testing shall be performed by using an X-ray fluorescence analyzer (XRF). Laboratory chemical analysis may be used if approved by HUD in cases where it is not practical to obtain XRF readings. XRF readings of 1 mg/cm<sup>2</sup> or higher are considered positive for presence of lead-based paint.

#### **(d) Hazard abatement requirements.**

(1) *Abatement actions.* Hazard abatement actions shall be carried out in accordance with the following requirements and order of priority:

(i) Unit housing or to be housing a child with an EBL. If defective lead-based paint surfaces are found within the unit, the entire surface shall be treated. Any chewable surface found to contain lead-based paint shall be treated. Treatment of a unit for an applicant family which has an EBL child shall be completed prior to occupancy. Where full treatment of a unit housing an EBL child cannot be completed within five days after positive testing, emergency intervention actions (including removing defective lead-based paint and scrubbing surfaces after such removal with strong detergents) shall be taken within such time. Full treatment of a unit housing an EBL child shall be completed within 14 days after positive testing, unless funding sources are not immediately available. In such event, reprogramming of previously approved CIAP funds, or emergency modernization funds, shall be requested immediately.

(ii) PHA owned or operated child care facilities used by a child with an EBL. If defective lead-based paint surfaces are found within the facility, the entire surface shall be treated. Also any chewable surface found to contain lead-based paint shall be treated.

(iii) Common areas (including non-dwelling PHA facilities which are commonly used by children under seven years of age) and exterior applicable surfaces of projects in which children with EBLs reside. Where considered necessary and appropriate by the PHA and HUD, abatement shall be provided to defective lead-based paint spots on common areas and exterior applicable surfaces other than chewable surfaces, and to complete chewable surfaces containing defective or intact lead-based paint.

(2) *Abatement methods.* Abatement shall be provided by such methods as described in § 35.24(b)(2). The PHA shall select a cost-effective and safe treatment for the surface under the circumstances.

(3) *Tenant protection.* The PHA shall take appropriate action to protect tenants including children with EBLs, other children, and pregnant women from hazards associated with abatement procedures. When necessary, tenants must be relocated during abatement in order to mitigate possible health hazards arising from the abatement process, except when abatement is accomplished by removal of woodwork or covering of walls or woodwork. Tenant relocation may be accomplished with CIAP assistance.

(4) *Disposal of lead-based paint debris.* The PHA shall dispose of lead-based paint debris in accordance with applicable local, state or Federal requirements. (See, e.g., 40 CFR Parts 260-271.)

(e) *Records.* The PHA shall maintain records on which units, common areas and exteriors and PHA child care facilities have been tested, results of the testing, and the condition of painted surfaces by location in or on the unit, common area, exterior surface or PHA child care facility. The PHA shall report information regarding such testing, in accordance with such requirements as shall be prescribed by HUD. The PHA shall also maintain records of abatement provided under this subpart, and shall report information regarding such abatement, and its compliance with the requirements of 24 CFR Part 35, Subpart A and § 965.703, in accordance with such requirements as shall be prescribed by HUD. If records establish that a unit, PHA child care facility, exterior or common area was tested or



treated in accordance with the standards prescribed in this subpart before or after September 23, 1986, such units, child care facilities, exteriors or common areas are not required to be re-tested or re-treated.

(Information collection requirements contained in paragraph (e) were approved by the Office of Management and Budget under control number 2577-0090.)

#### § 965.706 Compliance with state and local laws.

(a) *PHA responsibilities.* Nothing in this subpart H is intended to relieve a PHA of any responsibility for compliance with state or local laws, ordinances, codes or regulations governing lead-based paint testing or hazard abatement. The PHA shall maintain records evidencing compliance with applicable state or local requirements, and shall report information concerning such compliance, in accordance with such requirements as shall be prescribed by HUD.

(b) *HUD responsibility.* If HUD determines that a state or local law, ordinance, code or regulation provides for lead-based paint testing or hazard abatement in a manner which provides a comparable level of protection from the hazards of lead-based paint poisoning to that provided by the requirements of this subpart and that adherence to the requirements of this subpart would be duplicative or otherwise cause inefficiencies, HUD may modify or waive the requirements of this subpart in such manner as may be appropriate to promote efficiency while ensuring such comparable level or protection.

(Approved by the Office of Management and Budget under OMB Control Number 2577-0090.)

#### § 965.707 Monitoring and enforcement.

PHA compliance with the requirements of this subpart will be included in the scope of HUD monitoring of PHA operations. Noncompliance with any requirement of this subpart may subject a PHA to sanctions provided under the Annual Contribution Contract or to enforcement by other means authorized by law.

### PART 968—COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

12. The authority citation for Part 968 is revised to read as follows:

Authority: United States Housing Act of 1937 (42 U.S.C. 1437), sec. 7(d), Department of HUD Act (42 U.S.C. 3535(d)).

13. Section 968.4 is amended by adding new paragraphs (h) and (i) to read as follows:

#### § 968.4 Eligible costs.

(h) *Lead-based paint testing.* Lead-based paint testing costs, as described in §§ 965.705 (a), (c) and 968.9(e), are eligible modernization costs.

(i) *Lead-based paint hazard abatement.* Lead-based paint hazard abatement costs, as described in §§ 965.705(d) and 968.9(e) are eligible modernization costs.

14. Section 968.5 is amended by revising paragraph (d), adding a new paragraph (g)(3), revising paragraph (h), and adding a new paragraph (i)(6)(ix) and an OMB control number to the end of the section to read as follows:

#### § 968.5 Procedures for obtaining approval of a modernization program.

(d) *HUD screening.* The HUD office shall review the Preliminary Application. The HUD office shall select the Preliminary Application for further processing on the basis of such factors as the urgency of the need and the management and modernization capability of the PHA.

(g) \*\*\*

(3) *Lead-based paint testing and abatement funding.* In general, modernization involving lead-based paint testing and abatement may be funded in one or two stages as described in subparagraphs (g) (1) and (2) of this section.

(h) *HUD preliminary funding decisions.* After all of the Joint Reviews, the HUD office will determine whether the PHA will be invited to submit the Final Application for the identified project(s) by considering whether the PHA has adequately addressed all relevant issues, as determined by HUD, giving preferences to PHAs which request assistance for:

(1) Group 1, projects having emergency conditions that pose an immediate threat (*i.e.*, must be corrected within one year of funding approval) to tenant health or safety. Funding is limited to correction of emergency conditions and may not be used for substantial rehabilitation. Emergency conditions include all testing as required by § 965.703 (a) and (c) and abatement as required by § 965.705(d).

(2) Group 2, projects: (i) Having conditions which threaten tenant health or safety or having a significant number (10 percent or more) of vacant or substandard units and (ii) located in PHAs having demonstrated a capability

of carrying out the proposed modernization activities (comprehensive, special purpose and homeownership modernization).

Within this category, the Secretary may give priority to additional factors, such as the correction of physical disparities under the nondiscrimination preference, second or subsequent stage of comprehensive modernization, cost benefit, and the severity of lead-based paint hazard abatement needs.

(3) Group 3, other projects located in PHAs having demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose and homeownership modernization). The Secretary may give priority to factors which demonstrate that the modernization will result in the greatest cost benefit.

(i) \*\*\*

(6) \*\*\*

(ix) The PHA must certify that it will comply with local and state public health testing requirements.

(Information collection requirements contained in paragraph (i)(6)(ix) were approved by the Office of Management and Budget under control number 2577-0090)

15. Section 968.9 is amended by revising paragraph (e) and adding an OMB control number to the end of the section to read as follows:

#### § 968.9 Other program requirements.

(e) *Lead-based paint poisoning prevention.*

(1) *General.* The PHA shall comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846) and HUD implementing regulations (24 CFR Part 35 and Part 965, Subpart H).

(i) *Comprehensive Modernization in Progress.* For comprehensive modernization projects which involve the breaking of a painted surface which may contain lead-based paint and for which funds have been reserved by HUD before [effective day of this rule], no construction contracts, excluding those solely for emergency work items, shall be executed until random testing as described in this paragraph has taken place and any necessary abatement as described in this paragraph and § 965.705(d) is included in the modernization budget.

(ii) *Applications for Comprehensive Modernization Projects.* For Comprehensive Modernization projects for which funds are reserved on or after [effective date of this rule], no construction contracts, excluding those solely for emergency work items, shall



be executed until random testing as described in this paragraph has taken place and any necessary abatement as described in this paragraph and § 965.705(d) is included in the modernization budget.

(2) *Random testing.* If the family project was—

(i) Constructed or substantially rehabilitated prior to 1973, or

(ii) Constructed or substantially rehabilitated during or after 1973 but before 1978 under circumstances not subjecting such construction or rehabilitation to the requirements of 24 CFR Part 35 (as then in effect).

The PHA shall cause a random sample of the comprehensive modernization project units to be tested for lead-based paint on chewable surfaces and defective paint surfaces. Ten units shall be tested in comprehensive modernization projects with 20 or more units, and six units shall be tested in projects with fewer than 20 units, together with a sample of common areas and exterior chewable surfaces and defective paint surfaces which are part of the comprehensive modernization project. Common areas included in the

sample may include PHA-owned or operated child care centers or non-dwelling PHA facilities commonly used by children under seven years of age. If none of the tested units, common areas or exterior applicable surfaces contain lead-based paint, the comprehensive modernization project may be considered free of lead-based paint, and no further testing or abatement action will be required. If lead-based paint is found in any units in the sample, all units in the comprehensive modernization project are required to be tested. If lead-based paint is found in any common areas, all common areas in the comprehensive modernization project are required to be tested. If lead-based paint is found in any exterior applicable surface, all exterior applicable surfaces in the comprehensive modernization project are required to be tested. In the comprehensive modernization projects that are known to contain some lead-based paint, no random sampling is necessary, but each unit shall be tested. Testing requirements as described in § 965.703(c) shall be followed.

(3) *Abatement.* Where defective lead-based paint is found on a wall or ceiling

surface within a unit or a PHA-owned or operated child-care facility, the entire wall or ceiling surface shall be treated. If lead-based paint is found on chewable surfaces within a unit, the entire chewable surface shall be treated. In common areas, including interior surfaces or non-dwelling PHA facilities (which are commonly used by children under seven years of age), and on applicable exterior surfaces, treatment shall be provided to defective lead-based paint spots and to complete chewable surfaces containing defective or intact lead-based paint. Abatement within a comprehensive modernization project should be prioritized in relation to the immediacy of the hazards found to children under seven years of age.

\* \* \* \* \*

(Information collection requirements contained in paragraph (e) were approved by the Office of Management and Budget under control number 2577-0090)

Dated: July 30, 1986.

Samuel R. Pierce, Jr.,

Secretary.

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**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****Office of the Secretary****24 CFR Parts 35, 510, 511, 570 and 590****[Docket No. R-86-1291; FR-2243]****Lead-Based Paint Hazard Elimination in Community Development Block Grant, Urban Development Action Grant, Secretary's Fund, Section 312 Rehabilitation Loan, Rental Rehabilitation and Urban Homesteading Programs****AGENCY:** Office of the Secretary, HUD.**ACTION:** Proposed rule.

**SUMMARY:** HUD invites public comment concerning amendment to its regulations regarding the elimination of hazards due to lead-based paint in Community Development Block Grant, Urban Development Action Grant, Secretary's Fund, Section 312 Rehabilitation Loan, Rental Rehabilitation and Urban Homesteading programs. This proposed rule would amend 24 CFR Part 35, Lead-Based Paint Poisoning Prevention in Certain Residential Structures; 24 CFR Part 570, Community Development Block Grants; 24 CFR Part 510, Section 312 Rehabilitation Loan Program; 24 CFR Part 511, Rental Rehabilitation Grant Program; and 24 CFR Part 590, Urban Homesteading Program.

HUD is reconsidering its current regulations implementing section 302 of the Lead-Based Paint Poisoning Prevention Act in light of advances in knowledge regarding the causes of elevated blood lead levels of children as well as hazard detection and abatement techniques. HUD is also reexamining its regulations pursuant to the mandate of *Ashton v. Pierce*, 716 F.2d 56 (D.C. Cir. 1983), a case in which public housing tenants in the District of Columbia challenged the adequacy of HUD's lead-based paint regulations.

**DATE:** Comments due September 30, 1986.

**ADDRESSES:** Comments on rule: Interested persons are invited to submit comments regarding this proposed rule to the Office of General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Comments should refer to the above docket number and date of publication. A copy of each comment submitted will be available for public inspection during regular business hours at the above address.

Comments on information collection: Comments on the information collection requirements contained in this proposed

rule should be submitted both to the HUD Rules Docket Clerk at the above address and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20504, Attention: Desk Officer for HUD. They should contain the docket number and date of publication.

**FOR FURTHER INFORMATION CONTACT:**

For Community Development Block Grant programs contact Don Patch, Director, Office of Block Grant Assistance, (202) 755-6587, Room 7280; for Urban Development Action Grant program contact Stanley Newman, Director, Office of Urban Development Action Grants, (202) 755-6290, Room 7262; for Secretary's Fund programs including Indian Community Development Block Grants, Insular Areas Community Development Block Grants and Special Projects contact Leroy Connella, Director, Secretary's Fund Division, Office of Program Policy Development, (202) 755-6092, Room 7134; for Section 312 Rehabilitation Loan, Rental Rehabilitation and Urban Homesteading programs contact Nancy Blauvelt, Office of Urban Rehabilitation, (202) 755-5970, Room 7164; Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. (These are not toll-free telephone numbers.)

**SUPPLEMENTARY INFORMATION:****I. Background**

This rulemaking was initiated in response to the *Ashton* court order by publication of an Advance Notice of Proposed Rulemaking (ANPR) (49 FR 19210, May 4, 1984), which solicited public comment on issues relating to implementation of lead-based detection and hazard abatement procedures in the many distinct HUD programs to which the statute applies. Pursuant to subsequent orders of the United States District Court for the District of Columbia, proposed lead-based paint rules for Public and Indian Housing and minimum requirements for other HUD programs (51 FR 5666, February 14, 1986) and for Housing programs (51 FR 24112, July 1, 1986) have been published. This proposed rule, which addresses the hazards of lead-based paint in Community Development Block Grant (CDBG), Urban Development Action Grant (UDAG), Secretary's Fund (including Indian CDBG, Insular Areas CDBG and Special Projects), Section 312 Rehabilitation Loan (Section 312), Rental Rehabilitation and Urban Homesteading programs, is also being published pursuant to the subsequent order of the District Court. This order

requires publication of a final rule not later than February 15, 1987.

The issue of what procedures may be "practicable" differs within the various HUD programs. For example, in the Public and Indian Housing programs and FHA Single Family Property Management and Disposition program, the cost of hazard abatement is a public cost. However, in the FHA Single Family and Multifamily Insurance and Coinsurance programs, the cost of hazard abatement required to qualify an existing property for FHA mortgage insurance or coinsurance is a private cost to be borne by the seller. In the Section 8 Existing Housing Certificate, Housing Voucher and Section 8 Moderate Rehabilitation programs, the cost of hazard abatement required to qualify the rental unit as one in which a very low-income tenant's rental payment will be subsidized must be borne by the private landlord. Similarly, the Rental Rehabilitation, CDBG, UDAG, Urban Homesteading, and Section 312 programs all deal with predominantly privately-owned real property—either owner-occupied or rental residential. Though program requirements differ from program to program and between agencies based upon their local program designs, the cost of hazard abatement frequently falls in whole or in part on the private owner.

For the Rental Rehabilitation program, for example, no more than 50 percent of the rehabilitation costs not to exceed \$5,000 can be provided in the form of construction subsidies with the remainder of the funds coming from the owner. Many agencies also require some form of repayment of the subsidy. Under the CDBG program, owner-occupied and/or rental properties may be rehabilitated under grants or combination grant/loans. Some or all of the cost of hazard abatement can thus fall on the lower-income private owner. Under the Section 312 program, owner-occupied properties are rehabilitated at below-market-interest rate (3 percent) loans and investor properties are rehabilitated with below-market-rate loans which may also be combined with CDBG loans or grants. The effect of hazard abatement requirements, thus, has a direct impact on lower-income homeowners as well as the owners and tenants (usually lower-income) of rental properties. The increased costs of abatement may cause the rehabilitation of rental properties to become infeasible given the income of the properties and the limitations on the subsidies that can be provided. It can also cause a considerable number of owner-occupied



properties to fall outside the limits imposed by cities on their rehabilitation programs or cause otherwise feasible owner-occupied properties funded through local loan programs to exceed the amount lower-income homeowners can borrow. The impact of the inspection, testing and abatement costs on the availability of the programs to their intended participants is a relevant consideration in determining whether the requirements are "practicable"; see discussion of *Ashton* decision below and the Proposed Program Requirements in Section IV.

This preamble is divided into the following five sections: (1) Background (discussion of statutory and regulatory requirements and the *Ashton* decision); (2) ANPR (summary of the comments that focus on the CDBG programs); (3) Recent Studies of the Lead-Based Paint Problem (including the Centers for Disease Control's January 1985 Statement and the Environmental Protection Agency's Air Quality Criteria for Lead); (4) Proposed Program Requirements; and (5) Section-by-Section Review of Proposed Regulations.

#### A. Statutory and Regulatory Requirements

HUD's authority to issue this rule is based on the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4821-4846 ("LPPPA"). Added in 1973, section 302 of LPPPA requires the Secretary of HUD to "establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary." The statute further prescribes that such procedures shall "as a minimum provide for . . . appropriate measures to eliminate as far as practicable immediate hazards due to the presence of paint which may contain lead and to which children may be exposed;" and, further, that the procedures must apply to housing constructed prior to 1950 and "may apply to housing constructed during or after 1950 if the Secretary determines, in his discretion, that such housing presents hazards of lead-based paint."

HUD implemented section 302 of LPPPA by promulgating regulations in 1976 which are found at 24 CFR Part 35 and by incorporating Part 35 in other program-specific regulations. Revision of Part 35 has recently been proposed (51 FR 5666, February 14, 1986; 51 FR 24112, July 1, 1986). This proposed rule will also

amend Part 35 and supersede proposed Subpart C of Part 35's minimum requirements by establishing specific program requirements. This proposed rule also revises the definition of HUD-associated housing in § 35.3. The definition of HUD-associated housing is revised to more clearly follow the intent of section 302 of the LPPPA. The revised definition reflects the statute's emphasis on an "application for mortgage insurance or housing assistance payments." The legislative history contains no explicit indication of the intended scope of the phrase "housing assistance payments." The phrase was not in general use as a description of subsidy payments under any particular program in 1972, when Senator Schweiker introduced the floor amendment which became the basis for section 302, or in 1973 when the legislation was finally enacted. The Community Development Block Grant program was not authorized until 1974. However, HUD believes it likely that Congress intended to cover subsidies for housing rehabilitation and construction provided under predecessor programs, including the Model Cities program, of which Congress was specifically aware when considering lead-based paint legislation. See, generally, *Lead-Based Paint Poisoning Amendments of 1972: Hearings on S. 3080 Before the Subcommittee on Health, Senate Committee on Labor and Public Welfare*, 92d Cong., 2 Sess. (1972). Accordingly, HUD believes that the use of CDBG funds for housing rehabilitation is included within the scope of "housing assistance payments" as used in Section 302.

#### B. The Ashton Decision

HUD was required to reconsider its lead-based paint regulations by the United Court of Appeals for the District of Columbia Circuit. In *Ashton v. Pierce*, the Court held that the Department's Lead-Based Paint regulations (Part 35) were invalid because they were inconsistent with the LPPPA's mandate that the Secretary establish procedures for HUD-assisted housing "to eliminate as far as practicable immediate hazards due to the presence of paint which may contain lead and to which children may be exposed. . . ." 42 U.S.C. 4822.

Specifically, the Court held that the regulations are deficient in not treating any intact lead-based paint surfaces accessible to children as an "immediate hazard" under the Act. The current regulations define "immediate hazard" as "paint . . . which is cracking, scaling, chipping, peeling or loose." The definition did not require that the lead content in the paint be measured or

identified, only that the condition of the paint be defective. The definition excluded intact or "tight" paint regardless of its lead content. The Court concluded that the Act's language and its legislative history demonstrate "that Congress intended the Department to eliminate at least lead-based paint that is accessible to, and chewable by, children." 716 F.2d 63.

The Court affirmed the district court's holding that the Department had failed to fulfill its statutory duty to establish procedures to eliminate the hazard of accessible intact paint "as far as practicable." The Court concluded that the administrative record of HUD's rulemaking showed that the Department erroneously placed too much emphasis on cost-effectiveness in determining the practicability of hazard elimination measures. The Court held that the "as far as practicable standard allows the Department to consider cost and technical considerations in developing its regulations and that the threshold of practicability is reached if there exist reasonably available techniques for eliminating the hazard." 716 F.2d 64. The Court, however, declined to affirm the district court's finding that the administrative record established that elimination of chewable intact paint is in fact practicable. The Court determined that in undertaking further rulemaking to bring the lead-based paint regulations into conformance with the Act's mandate regarding "immediate hazards", the Department should also consider the practicability issue. For a further discussion of the practicability standard see Section IV.C. below.

#### II. Advance Notice of Proposed Rulemaking and Comments

HUD commenced rulemaking by publishing an Advance Notice of Proposed Rulemaking (ANPR) (49 FR 19210, May 4, 1984). The ANPR raised four major regulatory issues: (1) Hazard Determination; (2) Program Coverage; (3) Notification; and (4) Monitoring and Enforcement. Several questions were raised within each of the principal issues. Thirty-nine comments were received from commenters including public housing agencies, state, county and city health departments, cities, trade associations, public interest organizations, state housing authorities and individuals. Commenters submitted or referred to numerous articles and papers that addressed additional aspects of the problem.

The proposed lead-based paint rule for Public and Indian Housing discussed public comments regarding hazard determination, notification, monitoring



and enforcement (51 FR 5666, February 14, 1986). This section will discuss the ANPR questions and comments regarding CDBG program coverage. The ANPR did not raise any specific questions pertaining to the other programs covered by this proposal, and no comments were received regarding the other programs.

Eleven commenters commented on the CDBG program coverage questions. The first issue was "What mechanisms, now not in place, for assuring compliance with any requirements imposed by HUD hazard elimination regulations can be integrated into the inspection processes likely to be utilized by grantees under the block grant program with respect to residential rehabilitation funded under the program?" Three of the six commenters responding to this question offered measures for assuring compliance with any requirements imposed by HUD hazard elimination regulations. These measures included: (1) Require inspectors to abide by the same regulations as established for Section 8 housing; (2) dedicate greater resources to CDBG housing inspections; and (3) require the contractor, who does the rehabilitation work, to remove the lead-based paint hazards or forfeit payment of any work that they have done. The Department was encouraged to institute the following: (1) Training for local CDBG housing rehabilitation inspectors (including inspection methods, abatement procedures and full explanation of Department regulations); (2) standardization and reduction of the cost of testing procedures; (3) shared information network (including techniques for removing, identifying and preventing lead-based paint hazards); and (4) understandable and straightforward regulations.

One redevelopment authority responded that the CDBG program already requires too much inspection and counseling regarding lead-based paint hazards. They inspected 9,000 properties for lead-based paint in 1982 and only 10% of those properties were approved for loans. One commenter urged complete removal of lead-based paint as a requirement for block grant assistance, and the cost of compliance should be separately stated and separately funded. One commenter suggested inspection at the time renovations are planned and that renovation should include consideration of making the dwelling lead-free. If the cost of this type of abatement is prohibitive and exceeds the allocated funds, the commenter suggested that the dwelling should be made lead-safe.

The second issue was "What hazard elimination standards would be appropriate to be imposed in the specific context of block grant programs, taking into account existence or non-existence of applicable local requirements, likely availability of hazard detection equipment, impact on program participation, and other considerations mentioned in this Notice?" Each of the six commenters responding to this question expressed a different hazard elimination standard. Suggested standards included: (1) Compliance with state and local lead-based paint requirements; (2) use of Section 8 standards; (3) elimination of lead-based paint hazards in all pre-1950 housing and for post-1950 housing, require elimination of lead-based paint hazards if testing confirm its presence on either interior or exterior exposed surfaces (screening of children should be used to identify high-risk areas); (4) use a "reasonable approach" in determining coverage, particularly where the beneficiary of funds is a private individual since private expenditure of funds is also indicated; (5) remove all lead-based paint; and (6) remove all lead-based paint up to a four-foot level (all other areas should be scraped) on oral contact surfaces with excessive amounts of lead (commenter also added that most rehabilitation grantees will comply to get the assistance).

Several other issues were raised by commenters with respect to the program coverage of lead-based paint abatement in the CDBG program. One commenter noted that lead-based paint removal expenditures prevent low-income homeowners from getting loans for what they really need (*i.e.*, heating). Similarly, the removal of intact lead-based paint from interior surfaces may not balance the need to provide decent, safe and affordable housing as required in the Housing and Community Development Act of 1974. One commenter believes elimination of lead-based paint hazards is a low- and moderate-income benefit regardless of the area where it is performed. Another commenter suggested that lead-based paint requirements should not apply in cases of minimal rehabilitation assistance. One commenter noted that lead-based paint requirements add on to owners' costs and discourage some eligible recipients from participating in the CDBG programs. One commenter suggested temporary housing should be provided for families whose units are being deleaded.

### III. Recent Studies of the Lead-Poisoning Problem

Since publication of the ANPR, several new studies involving lead-based paint poisoning have been released. These studies include the CDC January 1985 Statement and the EPA Air Quality Criteria for Lead. HUD solicits comments on other recent lead-based paint poisoning studies.

#### A. Centers for Disease Control's January 1985 Statement

In January 1985, the Centers for Disease Control (CDC) issued a second revision to its statement entitled *Preventing Lead Poisoning in Young Children*. Based on new research findings on lead toxicity, CDC redefined lead poisoning at a lower blood lead level (from 30 to 25 micrograms of lead per deciliter of whole blood) and updated its recommendations on lead-based paint abatement.

#### B. EPA Air Quality Criteria for Lead

EPA's Air Quality Criteria for Lead evaluates and assesses scientific information on the health and welfare effects associated with exposure to various concentrations of lead in ambient air. The document considers all sources of lead including lead-based paint. At the time of publication of this proposed rule, the criteria document is still under review. HUD considers this document to be a potential source of helpful information for this rulemaking and expects to consider its conclusions in developing a final rule.

### IV. Proposed Program Requirements

The Department proposed to alter the structure of its regulations implementing the LPPA in its proposed lead-based paint rules for Public and Indian Housing and minimum requirements for other HUD programs which were published on February 14, 1986 (51 FR 5666). It was proposed that 24 CFR Part 35 would continue to state generally applicable minimum requirements but would authorize Assistant Secretaries to promulgate program-specific regulations which would supersede the general inspection and hazard elimination requirements of Subpart C of 24 CFR Part 35. The rationale for this proposal was to integrate the lead-based paint requirements into the administrative and operational structures of different programs and allow for "practicability" determinations to be based on specific program circumstances.

Few substantive changes were proposed in Part 35 except that the notification requirements in Subpart A of Part 35 were proposed to be extended



to all HUD-associated housing constructed during the period 1950-1977. Testing and hazard abatement requirements of Subpart C of Part 35 were proposed to be limited to all HUD-associated housing constructed prior to 1978. Subpart C's minimum inspection and abatement requirements continued to be based on defective paint surfaces. This proposed rule revises the definition of HUD-associated housing in § 35.3 as discussed in Section I.A. Inspection and hazard abatement requirements of Subpart C (24 CFR 35.24), which were previously proposed on July 1, 1986, are repeated in this proposed rule to demonstrate the requirements that are being superseded by this proposed rule.

After a general discussion of the construction cut-off dates, testing and the practicability standard, proposed lead-based paint program requirements will be discussed for the CDBG, Urban Homesteading, Section 312, and Rental Rehabilitation programs. The proposed CDBG regulations at § 570.608 (Subpart K) also apply to Entitlement Grants (Part 570, Subpart D), Secretary's Fund programs including the Insular Areas and Special Projects programs (Part 570, Subpart E), Small Cities program (Part 570, Subpart F), UDAG (Part 570, Subpart G), Loan Guarantees (Part 570, Subpart M) and Indian CDBG programs (Part 571). HUD intends only to cover properties approved for assistance after the effective date of the final rule.

#### A. Construction Cut-Off Dates

As previously mentioned in Section I.A. above, Section 302 of LPPPA provides that its requirements must be applied to housing constructed prior to 1950 and that they may be applied to housing constructed during or after 1950 "if the Secretary determines, in his discretion, that such housing presents hazards of lead-based paint." The hazard elimination requirements contained currently in Subpart C of Part 35 apply to all "HUD-associated housing," whenever constructed. On the other hand, the notification requirements contained in the current Subpart A of Part 35 are limited to purchasers and tenants of housing constructed prior to 1950. The administrative record of the 1976 rulemaking did not make clear the basis of the Secretary's determination that prompted extension of the hazard elimination requirements to post-1950 housing, and the record suggested that no determination of the presence or absence of a hazard was made in the context of addressing the notification requirements. In *Ashton*, the plaintiffs challenged the Department's failure to extend the hazard notice requirements

to post-1950 housing. Notwithstanding that the Department had extended to post-1950 housing, the District Court apparently viewed the notice requirement as a separate context and declined to impose an extended notice requirement on the basis of whatever determination had been made regarding hazard elimination. In the notice context, the District Court found no evidence that the Secretary had addressed the issue at all. The Court therefore held that there was no record of an actual determination that was adequate for review and, further, that the Secretary's discretion in the matter was unreviewable in any event. The Court of Appeals affirmed, on modified grounds, holding that there was "no enforceable duty on the Secretary to make such a determination" and, therefore, that the Secretary's failure to address the question was not reviewable.

The question of extension of the hazard elimination requirements applicable to defective paint surfaces stands upon a different ground than the question of notice extension that was considered by the *Ashton* courts, because in the 1976 rulemaking, the Secretary was in fact determined to extend those requirements to post-1950 housing. The administrative record does not make clear an enunciated basis for this determination, and a major basis may be simply the fact that the Department's pre-statutory regulations, adopted in 1972, provided no construction cut-off date for the hazard elimination requirements (On the other hand, the 1972 regulations contained no hazard notice provisions, so that when the Department first considered that requirement after the statutory enactment, it somewhat more naturally considered the statutory cut-off date provisions as well). As noted in the previously published ANPR (49 FR 19210, 19221), in its Environmental Impact Statement prepared in connection with publication of the proposed rule in 1975, HUD rejected a 1950 cut-off date for hazard elimination requirements on the rationale that it would not provide "the maximum practicable protection to children affected by the programs within the Department's jurisdiction."

The discretion conferred by the statute as to extension of the hazard elimination requirements relating to defective paint to post-1950 housing remains fully applicable. However, having once addressed the issue and made a determination, a reasoned basis for a change is required.

In the ANPR, the Department opened this question by soliciting comments as to whether there was a reasonably satisfactory construction cut-off date after which units should be presumed, for purposes of mandatory testing and hazard abatement requirements, to be free of lead-based paint. Commenters suggested various cut-off dates, ranging from 1950 to 1977, and supporting rationales. Several recommended 1971, when the LPPPA's prohibition on use of lead-based paint in Federally-assisted construction or rehabilitation was enacted. Others recommended 1977, when the Consumer Product Safety Commission banned the commercial sales of paint having a lead content by weight of over .06%.

As indicated in the recent proposed rulemaking regarding public housing, HUD recently awarded a research contract to provide an estimate of the incidence and condition of lead-based paint in public housing units and common areas and an estimate of the cost of abatement under different regulatory approaches. In this study, the Department requested Childhood Lead Poisoning Prevention Program (CLPPPs) to assist in data collection by visiting five randomly selected local public housing projects (in areas with less than five local public housing projects, all projects were inspected) and inspecting them for the presence of lead paint. A total of 34 local programs visited 131 public housing projects and 262 units to test for the presence of lead-based paint. The programs used X-ray fluorescence analyzers ("XRFs") to test units, common areas such as halls, and site-wide facilities for the presence of leaded paint, and the amount of lead. The local inspectors also reported whether the paint was in good condition or defective (e.g., peeling or chipping).

Because prior research led the researchers to expect a high proportion of lead-based paint hazards in the oldest projects, the analysts split the sample into four age strata and obtained inspections in a larger number of older projects rather than newer projects. Defining paint with over 1 mg/cm<sup>2</sup> lead content on chewable surfaces accessible to children or in defective paint on flat surfaces such as walls or ceilings as constituting an "immediate hazard" for purposes of the study, the data shows such conditions existing in 69% of the sample units built in 1950 or before, 48% of the units built between 1951 and 1959, 44% of the units built between 1960 and 1977, and 7% of the units built in 1978 or later. In the few post-1978 sample units where lead was found, it was at a relatively low level, below 1.5 mg/cm<sup>2</sup>.



HUD currently does not have comparable data regarding housing units constructed under the programs covered by this proposed rule. However, HUD is cognizant that the use of lead-based paint in federally-assisted construction and rehabilitation has been prohibited since 1971. Section 401 of LPPPA, as enacted in 1971, directed the Secretary of Health, Education and Welfare to prohibit the use of lead-based paint in such construction or rehabilitation. The Secretary of HEW promulgated regulations in March 1972, and complementing regulations were adopted by the Secretary of HUD in August 1972. HUD believes it inappropriate to impose extensive testing requirements based on an assumption of noncompliance with Federal regulations.

As indicated above, the current Part 35 requirements for defective paint surfaces (paint on applicable surfaces (*i.e.*, all exterior surfaces of a residential structure, up to five feet from the floor or ground and which are readily accessible to children under seven years of age, and all interior surfaces of a residential structure) that is cracking, scaling, chipping, peeling or loose), extend to all "HUD-associated housing," without any construction cut-off date. The current regulations were adopted in 1976. As in the July 1, 1986 proposed rule, HUD is proposing two alternative provisions regarding defective paint abatement in programs to which the Secretary's discretion is applicable. Under one such proposal, the Secretary proposes to limit the defective paint abatement requirement to housing constructed prior to 1978, because of the ban on the commercial sale of paint having a lead content by weight of over .06% which became effective in 1977.

As an alternative, HUD proposes to limit all defective paint inspection and abatement requirements to pre-1950 housing. Considerations which would be relevant to the selection of such an alternative would be the extent of the presence of lead-based paint in different types of housing constructed in 1950 or later; the experience of CDBG and UDAG grantees, cities, state and local governments and agencies, redevelopment authorities, community development-related agencies, local health agencies, and others, including impacts on program participation and benefits; and recent evidence regarding the correlation of defective paint at different lead contents with elevated blood-lead levels in children or other serious adverse effects. In connection with this inquiry, and as an indication of the type of condition to which Congress

intended the requirements to apply, the Department notes that the selection of a 1950 cut-off date by Congress, made more than 20 years after that date, was based on Congress' conclusion that "lead-based paint for interior household use which contained *very high percentages of lead compounds, at least 50 percent lead in several cases*, was in fairly wide use during the years before 1950" (118 Cong. Rec. 20853 (1972) (Senator Schweiker) (see fuller quotation below).

The alternative proposals regarding defective paint are presented in the proposed rule at §§ 35.24(b), 510.410(c)(2), 511.11(f)(3)(ii) and 570.608(c)(3)(i).

For chewable surfaces (*i.e.*, all chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, such as protruding corners, windowsills and frames, doors and frames, and other protruding woodwork), the Secretary proposes to limit abatement requirements, where found practicable, to pre-1950 housing in all programs covered by this proposed rule. The Secretary declines to exercise his discretion to extend such requirements to post-1950 housing in such programs because it is not clear that the requirements, if so extended, would remain "practicable." The relative unavailability of lead-content measuring equipment and experienced operators is discussed in Section IV.B. below.

The Secretary proposes an intact paint inspection and abatement requirement for pre-1950 units for which rehabilitation assistance is sought under the CDBG, UDAG, Secretary's Fund (including Indian CDBG, Insular Areas CDBG and Special Projects), Section 312 and Rental Rehabilitation, limited to units to be occupied by families with children having an identified elevated blood lead level ("EBL"). This proposal is based in significant part on an understanding that: (1) The majority of rehabilitation assistance in these programs is to owner-occupied single family units; (2) blood lead level screening programs are available in most areas where the prevalence of EBL children is highest; and (3) lead-content measuring equipment is likely to be reasonably available in most areas where a blood lead level screening capacity is available. However, the Secretary declines to extend such requirements to post-1950 housing before an assessment of the effects of the new requirements, including delays in processing such assistance and effects on program participation.

## B. Inspection, Testing and Abatement

When introducing his floor amendment which became the basis of Section 302 of the LPPPA, Senator Schweiker discussed the procedures required by his amendment as follows:

Lead-based paint for interior household use which contained very high percentages of lead compounds, at least 50 percent lead in several cases, was in fairly wide use during the years before 1950. As a consequence, much of the housing in existence today which was constructed prior to 1950 is likely to contain paint with these very high levels of lead compounds. My pending amendment would require the Secretary of Housing and Urban Development to establish procedures to minimize the hazards of lead-based paint poisoning, when inspecting residential housing constructed prior to 1950 for which an application for mortgage insurance or housing assistance payments has been made to the Federal Government.

Before approving such a mortgage or initiating a subsidized program, HUD is currently inspecting such property to determine compliance with code enforcement and the value of the property for mortgage purposes. Therefore, these procedures would not present an additional burden or significant cost to HUD. The amendment would require the Secretary to establish procedures to eliminate the hazard when paint in housing constructed prior to 1950 is found to be cracking, scaling, peeling, or loose . . .

My amendment would also require the Secretary to give to the buyers of such housing assured written notification of the hazards of lead-based paint, as well as a description of the symptoms and treatment of lead-based poisoning together with information concerning the importance of the removal of such hazards and techniques currently available to do so.

... my amendment would incorporate into an existing HUD procedure the means to warn the buyer of the hazard of lead-based paint and remove the immediate danger before he moves into the house.

The amendment would do two things. It would, first of all, provide an inspection procedure for each house that comes up in the Federal housing and FHA program during any particular year, whereby part of the inspection before FHA approval would be for chipping and peeling paint, and if such a condition is found FHA under the amendment would have the authority to go to the builder or the remodeler and have him remedy the situation before the house is accepted by FHA.

Second, notwithstanding the remedy provided, a notice must be given to the buyer in which he is warned of the danger of lead-based paint poisoning and pointing out that further chipping and peeling could occur and what to do about it.

Mr. Kennedy. I understand this pertains to the new purchaser of the home by giving his notice. That is one purpose of the



amendment. The second purpose of the amendment is to do something about the chipping or peeling of fragmentation of lead-based paint in old homes at the time of the transaction or sale.

What the Senator is doing effectively by his amendment is to provide an additional kind of remedy or effort to try to reach the situation that exists in the older buildings or houses being turned over under the FHA program. Is that correct?

Mr. Schweiker. That is correct. 118 Cong. Rec. 20853 (1972).

The above colloquy took place at initial introduction of the floor amendment and before the 1973 mark-up of the reintroduced legislation that resulted in deletion of the original reference in the statutory language to "cracking, scaling, peeling, or loose paint." Nevertheless, it indicates a strong Congressional expectation and intention that the new requirements would fit easily, without program disruption or substantial cost increase, into standard program administrative procedures. No departure from this expectation was indicated after the markup changes in 1973; in the brief floor discussion of the revised bill, it was described as "essentially the same measure unanimously approved by the Senate last June" (119 Cong. Rec. 1488, (1973) (Senator Kennedy)).

Inspection for defective paint conditions can be done easily by the appraiser or other customary inspector because no detection equipment beyond the naked eye is required. Inspection for intact paint having a measured lead content is another matter, requiring equipping the appraiser or inspector with special equipment. This requirement presents the most problematic consideration in determining the practicability of intact paint inspection and abatement requirements in program contexts.

Since *Ashton*, HUD has been considering the "practicability" of testing procedures for intact paint and abatement procedures for both defective and intact paint.

In the ANPR, HUD asked "What newly developed techniques are used by localities for the abatement of lead-based paint that is intact on accessible and chewable surfaces (e.g., outside corners and edges of window sills, frames, doors, cabinets, stairs, balusters, etc. within reach of children)?" and "What are the problems, effectiveness, availability and costs of such techniques?" Many commenters requested that HUD prescribe particular detection or abatement technologies. Some commenters asserted, however, that localities are best able to judge the appropriate detection and abatement

approach. Other commenters suggested that HUD should prescribe the use of XRFs or standard technologies to eliminate confusion and unnecessary deleading work. Commenters mentioned new techniques including high pressure water guns, low intensity heat guns, wall systems for covering and liquid paint removers. Many problems are associated with removal methods. With the exception of abatements involving wall coverings, hazardous dusts or fumes are produced.

CDC recommended that "it is better to establish performance standards than design criteria: This does not preclude new approaches in the search for better instrumentation to detect lead in wall coverings. The marketplace can decide the least expensive method of hazard abatement as long as the objective of permanently eliminating the hazard, either through removal of covering the lead paint surface, is met. To prescribe a particular method sometimes stops research into better ways to meet the goals." The state of the art of testing for existence of lead-based paint is currently limited to laboratory chemical analysis or portable XRFs. Portable XRFs are recommended by CDC, and are less costly than laboratory chemical analysis. Laboratory chemical analysis is discouraged because there is no direct equivalence between this type of analysis and the readings given by the XRFs. Lead paint analysis by laboratory chemical analysis also takes longer than by use of an XRF. The XRF provides immediate readings. In the laboratory chemical analysis approach, it is estimated that thirty to forty samples can be analyzed per day at a cost of \$12 per sample in a public laboratory. Typically, six to eight samples are taken per room to test for lead paint using the laboratory chemical analysis method. The costs for this service at private laboratories is estimated at \$25 per sample or \$175 per room. The cost of using an XRF is estimated at \$20 per room (taking twenty to twenty-five readings per room) and typically two three-bedroom units can be tested in one day. Two companies are currently manufacturing XRFs. The cost is approximately \$8,000 per machine, and the yearly maintenance is approximately \$2,500.

The number of chemical testing laboratories available throughout the country capable of handling HUD's testing, if required, is limited at best. To HUD's knowledge, there are less than 400 XRFs in existence throughout the United States to test not only housing in HUD programs but all other private housing. Most of the XRFs are owned by municipalities or organizations affiliated

with state or local governments which may or may not be available on a routine basis to test properties participating in HUD programs. HUD is also aware that there is substantial downtime in repairing the XRFs.

In addition to their limited availability, HUD has other concerns regarding the XRF. HUD received sixteen comments on the XRF in response to the proposed lead-based paint rule for Public and Indian Housing. A majority of commenters suggested readings produced by XRFs are highly inaccurate (e.g., XRFs are reported to read the opposite sides of walls, and to be influenced by lead pipes and other leaded building materials within the walls). Several commenters indicated that XRFs are not accurate at levels below 1.0 mg/cm<sup>2</sup>. Other commenters suggested that XRF readings may be unreliable because of operational factors and suggested the need for a uniform training program, technical resource center and quality control guidelines. It was also suggested that an independent evaluation of the two currently available XRF instruments should be undertaken prior to initiation of a national program for intact paint hazard abatement dependent on the use of such detection equipment. Other commenters were concerned about the effects of cobalt radiation in using the XRF.

The Court of Appeals in *Ashton* agreed with the District Court, which stated that the "as far as practicable" standard allows the Department to "consider cost and technical considerations in developing its regulations" and that the threshold of practicability is reached if there exist "reasonably available techniques" for eliminating the hazard. 541 F. Supp. 641. Based on these comments, recent demonstrations and literature research, HUD is further evaluating whether the XRF is a "reasonably available technique."

For purposes of this proposed rule regarding testing for lead-based paint, HUD proposes that the standard for reliable detection of surface area would be XRF readings of greater than or equal to 1 mg/cm<sup>2</sup>. Although a 0.7 mg/cm<sup>2</sup> standard is recommended in CDC's January 1985 statement, HUD proposes the 1 mg/cm<sup>2</sup> standard because of evaluations performed by the National Bureau of Standards (Evaluations of Lead Detectors, March 1977 and Evaluation of New Portable X-ray Fluorescent Lead Analyzers for Measuring Lead in Paint, May 1978) and because the vast majority of XRF's available today are designed to HUD's



specifications (minimum precision of  $\pm 0.2 \text{ mg/cm}^2$  at  $1 \text{ mg/cm}^2$ ). HUD requests further comments on the availability and reliability of XRFs, other reasonably available techniques, and the  $1.0 \text{ mg/cm}^2$  standard.

This regulation proposes testing in certain cases and proposes generally to rely on local or state public health, housing agencies or private concerns to test for lead-based paint. For lead testing, HUD is proposing CDC's approach which establishes performance standards rather than design criteria. Based on CDC's recommendation, HUD suggests the use of the XRF, but HUD will approve other methods which are developed and which adequately measure lead content. HUD is aware of approximately 50 active CLPPPs capable of testing lead-based paint, which have provided services in the past at nominal or no cost. Certain CLPPPs may be using only laboratory chemical analysis. HUD is interested in learning which localities use only this method. HUD is also interested in the feasibility of relying on these public and private concerns for testing. For the CDBG programs and other programs adopting its regulation, the grantee will be required to conduct and fund the required testing.

For abatement, HUD is not prescribing the particular method of abatement, but is requiring that the paint either be thoroughly removed or covered. HUD proposes minimum abatement standards in the CDBG program but is not limiting the available techniques. HUD proposes to use the treatment described in proposed 35.24(b)(2) for the programs covered by this rule.

Covering the hazard could include such methods as adding a layer of gypsum wallboard or a fiberglass cloth barrier to the wall surface. Depending on the wall condition, wallpaper (which is permanently attached and not easily strippable) may be used. Covering or replacing trim surfaces is also permitted. Paint removal could include such methods as scraping, heat treatment (infra-red or coil type heat guns) or chemicals. Sanding and use of propane torches are prohibited because of the additional hazards these methods create. Sanding produces the greatest deposit of lead in dust, with rates as high as  $10 \text{ mg}$  of lead/sq. ft/hour. Open flame methods cause the lead to vaporize. Washing and repainting without thorough removal or covering does not constitute hazard abatement. Comments are requested on these methods of treatment.

The effect of lead-based paint abatement requirements has a direct impact on lower-income homeowners as

well as the owners and tenants (usually lower-income) of rental properties. The increased costs of abatement may cause the rehabilitation of rental properties to become infeasible given the income of the properties and the limitations on the subsidies that can be provided. It can also cause a considerable number of owner-occupied properties to fall outside the limits imposed by cities on their rehabilitation programs or cause otherwise feasible owner-occupied properties funded through local loan programs to exceed the amount lower-income homeowners can borrow.

Many communities participating in the CDBG, UDAG, Rental Rehabilitation, Urban Homesteading, and Section 312 Loan Programs also have relatively small programs. The costs of purchasing equipment for testing for lead content on applicable surfaces is infeasible for such communities particularly since UDAG for entitled cities, Rental Rehabilitation and Section 312 programs provide no administrative dollars and all administrative costs related to those programs must be borne by the CDBG program or other sources of public funds. Such communities would probably have to rely on other, more individually expensive means of testing for lead content on applicable surfaces.

Lead-based paint inspection and abatement requirements must thus be balanced against the feasibility in terms of abatement costs to lower-income homeowners and the owners of rental residential property predominantly occupied by lower-income tenants as well as the practicability in terms of the scale of local rehabilitation operations and the availability of program funds to cover the costs of inspection. To mandate overly stringent requirements would only serve to reduce the number of lower-income families who can be served through such programs by making rehabilitation infeasible.

### C. Practicability Standard

The LPPPA requires HUD to establish procedures to eliminate "as far as practicable" the hazards of lead-based paint poisoning. The "practicability" standard applies to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments. The Department is of the legal opinion that the "practicability" standard applies to all "HUD-associated housing" as defined in § 35.3. In *Ashton*, the courts held that HUD had applied an erroneous standard in determining whether it was "practicable" to eliminate the immediate hazard of intact lead paint.

In the Court of Appeals' view, HUD had construed "as far as practicable" to mean "most practicable." The Court expressly rejected what it considered to be a "cost-benefit analysis" approach employed by the Department.

In plain language Congress commanded that if it is "practicable" to eliminate an immediate hazard, that hazard must be eliminated. The statute admits of no exceptions to the required elimination procedures on the basis of the degree of practicability. Neither Congress' concern about the cost of the elimination program nor congressional silence in the face of the Department's interpretation of the statute can overcome the clear statutory directive. *Id.* at 64.

The Court of Appeals concluded, however, that the administrative record had not established that elimination of chewable intact paint is in fact practicable. *Id.* Both the Court of Appeals and the District Court made specific reference to a HUD options paper considered by Secretary Carla A. Hills before promulgation of the 1976 rule. The paper listed five alternatives:

Alternative I—require scraping of loose, peeling, flaking paint and repainting (1972 regulation).

Alternative II—require removal of all paint from loose, flaking, peeling surface.

Alternative III—require scraping of loose, peeling, flaking paint and removal of all paint from chewable surfaces.

Alternative IV—require removal of all paint from both flaking, peeling surfaces and chewable surfaces.

Alternative V—require removal of all paint from all accessible, intact surfaces.

HUD had considered the following factors when evaluating these alternatives: (1) Total costs both to government and private owners, (2) benefits to children (qualitatively assessed), (3) impact on the effectiveness and availability of FHA program activities, and (4) possible redlining of neighborhoods and abandonment of housing. HUD selected alternative I.

The District Court approved HUD's conclusion that alternatives IV and V were impracticable due to adverse impacts of the major costs involved on continued FHA activity and the "unreasonable burden" placed on the FHA fund. But the District Court concluded that the Department had inappropriately used cost to compare the first three alternatives on a cost-effectiveness basis and reject alternatives II and III because it found alternative I alone to be cost-effective.

The Court of Appeals, however, rejected the District Court's conclusion



that HUD, by implication, had found options II and III to be practicable. Ambiguity in the administrative record to the 1976 rule, it held, did not support this inference. Moreover, the Court of Appeals did not question the District Court's acceptance of HUD's rejection of alternatives IV and V. The Court of Appeals stated:

It is peculiarly within the expertise of the Department to determine the practicability of a given elimination procedure. We agree with the district court that the "as far as practicable" standard allows the Department "to consider cost and technical considerations in developing its regulations" and that the threshold of practicability is reached if there exist "reasonably available techniques" for eliminating the hazard. . . . *Id.* at 64.

Although a practicability analysis will be presented for each program below, common issues affect each program. For example, the availability of testing resources is scarce given the magnitude of the possible demand. See Section IV.B. above. There are only 400 XRFs presently available to perform testing. Not considering any private demand for testing, if HUD imposed testing requirements on all of its housing programs, in the first year alone there could be a demand for testing of over four million units. It would take approximately 5½ years to test all of these units at a cost of over \$480,000,000. These statistics indicate the many side-effects that the availability of testing equipment and competent operators may have. The unavailability of testing equipment and competent operators will severely impact the effectiveness and availability of HUD program activities and may lead to redlining of certain older neighborhoods. Testing requirements may have the effect of driving users away from HUD programs. There is no guarantee that there will be a benefit to children. Without equipment, there will be severe program delays.

Implementation of the testing requirements in this proposed rule is subject to the availability of testing equipment. HUD is considering possible actions it may take if the testing equipment is not available. For UDAG and CDBG programs, HUD is considering allowing communities where testing equipment is unavailable to request a waiver of these requirements under § 570.5, where the grantee can demonstrate that undue hardship would result from applying the requirements and where application of the requirements would adversely affect the purposes of the Housing and Community Development Act of 1974.

HUD specifically requests comments on this issue.

HUD specifically invites comments regarding whether the forms of inspection, testing and abatement required in this proposed rule are practicable in all circumstances encompassed by the proposed rule. Additional questions for comment are also raised in the following program discussions.

During the course of this rulemaking proceeding, HUD will continue to evaluate the evidence submitted in response to the ANPR, the further studies referred to in this preamble, and such additional evidence and comments as may be received in response to this notice of proposed rulemaking, that are relevant to the foregoing questions.

#### *D. CDBG, UDAG, Secretary's Fund, Section 312 and Rental Rehabilitation*

1. *Scope.* Sections 510.410, 511.11(f) and 570.608 of the proposed rule establish procedures to eliminate as far as practicable the immediate hazards of lead-based paint poisoning with respect to any project constructed prior to 1978 (alternatively, 1950) which presents such hazards to children under seven years of age and which is rehabilitated with assistance under Parts 510, 511 and 570 respectively. This proposed rule also applies to entitlement grants (Part 570, Subpart D), Secretary's Fund programs including the Insular areas and Special Projects program (Part 570, Subpart E), Small Cities program (Part 570, Subpart F), UDAG (Part 570, Subpart G), Loan Guarantees (Part 570, Subpart M) and the Indian CDBG program (Part 571) because these programs incorporate Subpart K which includes § 570.608. The Section 312 and Rental Rehabilitation programs propose requirements similar to § 570.608. This proposed rule would affect approximately 88,200 units each year.

2. *Practicability Analysis.* Separate practicability analysis are provided for each of the affected programs below.

(a) *CDBG Program:* The CDBG program was not in existence at the time of enactment of Section 302 of the LPPPA. CDBG funds are extended to localities to be utilized for activities selected by them, limited only be broadly defined activity eligibility requirements and the requirement that at least 51% of CDBG funds must be used for activities principally benefiting low- and moderate-income persons. A substantial portion of CDBG funds are expended for residential rehabilitation.

According to a Comptroller General report entitled "Rental Rehabilitation With Limited Federal Involvement: Who Is Doing It? At What Cost? Who

Benefits?" (GAO/RCED-83-148, July 11, 1983), ninety-eight percent of the communities were financing rehabilitation of owner-occupied units with CDBG funds. In contrast, only 50 percent were financing investor-owned rental rehabilitation. According to the 1985 Consolidated Annual Report to Congress on Community Development Programs (CDBG, UDAG, Section 312, Urban Homesteading), the principal component of housing expenditures in FY 1982 was loans and grants to facilitate the rehabilitation of single family housing. Urban Counties concentrated a large majority of their housing funding, 73 percent of all such expenditures, in single-family rehabilitation. Metropolitan Cities, on the other hand, used their CDBG funds to undertake a broader range of activities such as the rehabilitation of multifamily (usually renter-occupied) housing, public housing modernization and the rehabilitation of other publicly-owned residential housing. Both types of grantees spent smaller amounts of housing funds in administering their housing programs and supporting code enforcement, general housing repair, housing development, or non-profit corporations or other sub-recipients to undertaken similar activities. Overall, these figures suggest that entitlement communities may be using their CDBG funds more for the rehabilitation of multifamily or rental properties than in past years. The differences in the mix of housing activities between cities and counties are consistent with general aggregate differences in their housing characteristics. Urban Counties, which are comprised of suburbs to a large extent, are characterized by single-family, owner-occupied housing. In contrast, Metropolitan Cities tend to have a greater proportion of multifamily rental housing and Federal public housing. Consequently, although single family rehabilitation still is by far the largest category of expenditures for cities, they spend a large proportion of funds in other areas than do Urban Counties.

Residential units rehabilitated with CDBG funds are within the scope of "HUD-associated housing" as defined by HUD. Accordingly, HUD's regulations for the CDBG program have required compliance with the hazard elimination requirements in the rehabilitation of existing housing with CDBG assistance. The hazard elimination regulations themselves assign responsibility for inspection of units rehabilitated with CDBG funds to the unit of local government or agency thereof.



The vast majority of CDBG assisted rehabilitation takes place in residential structures built prior to 1950, and it is these structures that probably have interior and/or exterior lead-based paint surfaces. Under the CDBG program, the use of program funds for residential rehabilitation is not limited solely to units occupied by low- and moderate-income persons, but the majority of rehabilitated units are occupied by such persons. If additional requirements to assure compliance with lead-based paint hazard elimination were to be imposed on grantees by HUD, the costs of such requirements would adversely affect local rehabilitation programs and make CDBG rehabilitated units less accessible to those most in need of affordable housing.

It should also be noted that HUD expects that extra costs imposed by these new requirements will cause CDBG grantees to either sharply reduce the number of units rehabilitated or to reduce funding for other activities being carried out with CDBG funds (public services, economic development, etc.). The proposed requirements, however, are revised in order to clarify that the costs of inspection, screening, and testing for lead-based paint hazards, as well as the costs of related equipment and supplies, are eligible expenditures. HUD invites comments on the probable direct impact of the cost of new lead-based paint requirements on local CDBG-assisted rehabilitation programs as well as the probable indirect impact of these requirements on other CDBG-funded activities.

(b) *UDAG Program*: UDAG funds are granted to localities to be used in support of private investments. The locality loans funds to private sector developers for economic development activities, and/or uses funds directly for such activities. These activities include commercial, industrial and neighborhood development. Residential rehabilitation is an eligible use of UDAG funds. Twenty-nine percent or 28,710 planned units in projects approved through FY 1985 involved rehabilitation. Though not funded at levels approaching Action Grant support for industrial or commercial projects, UDAG assistance to housing development activities has been substantial. The types of projects that include housing, the occupancy and construction characteristics of housing units developed through the Action Grant Program vary according to the type of project development involved. Housing development in mixed-use projects is characterized by the production or renovation of rental units.

Rental housing comprises 66 percent of the units developed as part of mixed-use projects; mixed-use projects also involve more new construction than housing-only projects. Rental housing is consistent with the thrust of mixed-use projects in supporting downtown development activities. In contrast, and reflecting the dominant purpose of housing-only projects to stabilize neighborhoods, 66 percent of such units involve rehabilitation and fully 83 percent are intended to be owner-occupied.

Residential units rehabilitated with UDAG funds are within the scope of "HUD-associated housing" as defined by HUD. Accordingly, HUD's regulations for the UDAG program have required compliance with the hazard elimination requirements in the rehabilitation of existing housing with UDAG assistance. The hazard elimination regulations themselves assign responsibility for inspection of units rehabilitated with UDAG funds to the unit of local government or agency thereof.

The majority of UDAG assisted residential rehabilitation takes place in structures built prior to 1950, and it is these structures that probably have interior and/or exterior lead-based paint surfaces. Under the UDAG program, the use of program funds for residential rehabilitation includes units occupied by low- and moderate-income persons. If additional requirements to assure compliance with lead-based paint hazard elimination were to be imposed on grantees and private sector participants by HUD, the costs of such requirements could adversely affect local rehabilitation programs and make UDAG rehabilitated units less accessible to those most in need of affordable housing.

It should also be noted that HUD expects that extra costs imposed by these new requirements will cause UDAG project recipients to reduce the number of units rehabilitated and could discourage applications for residential rehabilitation. The proposed requirements, however, are revised in order to clarify that the costs of inspection, screening, and testing for lead-based paint hazards, as well as the costs of related equipment and supplies, are eligible expenditures. HUD invites comments on the probable direct impact of the cost of new lead-based paint requirements on local UDAG-assisted rehabilitation programs.

(c) *Secretary's Fund*: (1) *Secretary's Fund for CDBGs for Indian Tribes and Alaskan Native Villages (Part 571) and for Insular Areas (Part 570, Subpart E)*.

The same concerns noted under the CDBG program section (Section IV.D.2(a)) apply to the Indian program and the Insular Areas program. In addition, because of the small size of many of these applicants, their isolation from urban areas and the grant ceilings limiting the size of grants, the testing requirements may be burdensome. HUD invites comments on the extent of the problems on reservations and in the Insular Areas, the age of housing and alternative approaches to addressing such problems. At the present time we anticipate that we will apply the regulations adopted for the CDBG program to these programs.

(2) *Secretary's Fund for CDBG Special Projects Program (Part 570, Subpart E)*. The same concerns noted under the CDBG program section (Section IV.D.2(a)) apply to the Special Projects program. In addition, rehabilitation has not been a significant activity under this program. We would expect to apply the regulations adopted for the CDBG program to the Special Projects program.

(d) *Section 312 Rehabilitation Loan Program*: The Section 312 program is a long existing program of the Department which provides direct loans to owners, both single family and investor owned properties, at below market interest rates in both CDBG areas and in communities participating in the Urban Homesteading program. The rehabilitation conducted in these program areas generally includes rehabilitation levels to bring the property up to local code standards and agencies have been instructed to comply with lead-based paint regulation requirements, although the requirements have not been formally published under the program's existing rules. The Department does intend to include the requirements when comprehensive rules for the program are developed. Since the objective of the program is to provide assistance to owners of property in need of rehabilitation, in order to make the rehabilitation of the property economically feasible, the additional requirement to abate hazards posed by all intact lead-based paint on the property would defeat this objective. For investor owned property, the investor generally would have to absorb the additional cost and pass it on to the tenants, thus pushing up the rents and making the rehabilitation infeasible in many cases. For the single family owner-occupied property (approximately 78 percent of the program), the cost for this single item would take up much of the loan assistance needed to correct other code deficiencies, which may require



additional financing at a higher rate, thus making the rehabilitation infeasible for this class of owner as well. This, as in the case of the Rental Rehabilitation Program, would have a negative impact on the ability of the program to accomplish its objective which is to provide an affordable source of financing for rehabilitation in CDBG areas and to support Urban Homesteading areas.

When inspections are required, however, the costs of inspection should be covered by the locality in charge of the program. It has been an established practice in the Section 312 program that the locality fully inspect the property and notify the applicant as to the necessary repairs needed to qualify for the assistance. This is currently the practice for lead-based paint items, and the Department would not like to impose the added costs on loan applicants under this program.

(e) *Rental Rehabilitation*: The Rental Rehabilitation program was designed by the Department to support its new Housing Voucher program by providing a sufficient supply of decent and affordable units for use by families receiving Housing Vouchers. The program provides construction grants to assist in the rehabilitation of privately-owned residential rental properties for up to 50 percent of the rehabilitation costs generally not to exceed \$5,000 per unit. The remaining funds to support the rehabilitation generally must be provided by the owner. Individual grantees have a wide variety of subsidy mechanisms ranging from grants to repayable amortized loans. The program is designed to accomplish moderate rehabilitation of approximately \$10,000 per unit. To the extent that lead-based paint abatement requirements cause the rehabilitation costs to exceed this average range, the owner would have to absorb the costs. Abatement of intact lead-based paint hazards could significantly impact the rehabilitation costs required to be provided by the owner and, given the modest level of rents for these units, could make many projects infeasible given project income. The primary housing stock being addressed by the program is, in fact, pre-1950 housing; so it may be assumed that such units would be significantly impacted by any universal requirements to abate hazards imposed by intact paint and thus potentially make rehabilitation of these units infeasible because of the added costs. This would have a direct, negative impact on the ability of the program to accomplish its objective of providing decent, affordable

housing for lower-income tenants receiving Section 8 rental assistance.

3. *Proposed Requirements*. The requirements of §§ 510.410, 511.11(f) and 570.608 include a prohibition against the use of lead-based paint, a notification of hazards of lead-based paint poisoning and the availability and advisability of blood lead level screening, and proposed requirements for the elimination of lead-based paint hazards. These requirements apply to existing housing which receives rehabilitation assistance. Under the proposed CDBG program requirements, the following activities are excluded: (a) Emergency repairs (not including lead-based paint-related emergency repairs); (b) weatherization; (c) water or sewer hook-ups; (d) installation of security devices (e.g., smoke detectors, locks, etc.); (e) facilitation of tax exempt bond issuances which provide funds for rehabilitation; (f) other similar types of single-purpose programs that do not include physical repairs or remodeling of applicable surfaces (as defined in § 35.22) or residential structures; and (g) any non-single purpose rehabilitation that does not involve applicable surfaces (as defined in § 35.22) that does not exceed \$3,000 per unit. HUD proposes that these projects should not be covered by § 570.608 because they do not involve rehabilitation of applicable surfaces.

These exempt activities differ from maintenance and modernization programs assisted under HUD's Comprehensive Improvement Assistance Program because the housing is privately owned and these activities are generally limited to under \$3,000 per unit. If HUD administratively imposed the proposed lead-based paint requirements on these small-scale, single-purpose activities, and these requirements had a significant impact on the cost of carrying out these activities, HUD expects that CDBG grantees would either drastically reduce the scope of such activities or eliminate them entirely from their programs. However, if these activities involve rehabilitation of applicable surfaces (as defined in proposed 24 CFR 570.608(c)(1)), defective paint and chewable surfaces must be treated as provided in proposed § 570.608(c).

Emergency repair programs are those local programs designed exclusively to correct a health or life-threatening situation and which do not include general repairs on the units. Such situations may include but are not limited to a leaking roof, defective heating system which has or is about to fail, or plumbing or electrical problems

which cause health or safety problems. HUD does not propose to exclude lead-based paint-related emergency repairs. In weatherization programs, cities will set aside \$500-600 per unit for weatherstripping, plastic window coverings and minimal insulations. CDBG funding may also be used to facilitate tax exempt bond issuances which provide funds for rehabilitation. CDBG funds subsidize issuance of the bonds including administrative costs but are not usually used to pay principals. All of these activities are single-purpose programs or non-single purpose rehabilitation under \$3,000 per unit that do not include significant physical repairs or remodeling of the interior or exterior surfaces of residential structures.

The proposed elimination section in the programs covered by this rule requires the grantee (the term grantee is used in this preamble because it is a common term used in the CDBG, UDAG and Rental Rehabilitation programs; for purposes of this preamble, loan recipients and local agencies in the Section 312 program are considered grantees as are recipients of State rehabilitation funds to inspect for defective paint surfaces in all units constructed prior to 1978 (alternatively 1950) which are occupied by families with children under seven years of age and which are receiving rehabilitation assistance. Defective paint surfaces are defined as paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose. Applicable surfaces include all exterior surfaces of a residential structure up to five feet from the floor or ground such as a wall, stairs, deck, porch, railing, window or doors, which are readily accessible to children under seven years of age, and all interior surfaces of a residential structure. The inspection is to occur at the same time the property is being inspected for rehabilitation. Defective paint surfaces will be included in the work write-up for the remainder of the rehabilitation work.

The grantee is required to test the lead content of chewable surfaces (i.e., all chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodwork) if the family residing in a unit, constructed prior to 1950 and receiving rehabilitation assistance, includes a child under seven years of age with an identified EBL condition. Lead content on chewable surfaces shall be treated by using an XRF or other method approved by HUD.



Test readings of 1 mg/cm<sup>2</sup> or higher using an XRF are considered positive for presence of lead-based paint.

Where inspections find defective paint surfaces, the defective areas are to be treated. Where testing finds leaded chewable surfaces, the entire interior and exterior chewable surface is to be treated. Treatment for defective paint and leaded chewable paint is to be performed before final inspection and approval of the work. Where weather prohibits repainting exterior surfaces before final inspection, the grantee may permit the owner to abate the defective paint or chewable lead-based paint and agree to repaint by a specified date. Abatement methods including various removal or covering techniques are acceptable.

The grantee is required to bear the costs of inspections and testing. Costs of purchasing any available equipment such as XRFs, are eligible costs under the CDBG program. Individual program requirements and local program design will determine whether the cost of abatement is to be borne by the owner, the grantee or a combination of the owner and the grantee. The grantee will be required to certify that inspections and tests for lead-based paint in housing units are in compliance with these regulations. The grantee is to keep a copy of the inspection reports for at least three years. The owner is required to protect tenants from hazards associated with abatement procedures and to notify the grantee of such measures taken.

HUD field office monitoring of rehabilitation programs will cover compliance with these requirements. In cases of noncompliance, HUD could impose conditions or sanctions on grantees.

If any other HUD assistance is provided to units covered by these proposed regulations, the more stringent requirements shall prevail. If HUD determines that a state or local law, ordinance, code or regulation provides a comparable level of protection from the hazards of lead-based paint poisoning, HUD may modify or waive these requirements. Grantees are reminded to comply with Federal, state or local requirements in disposing of lead-based paint and defective paint debris.

#### *E. Urban Homesteading*

The Department has also reviewed the Urban Homesteading program and has decided that the minimum lead-based paint standards in 24 CFR Part 35 should apply. The Assistant Secretary for Community Planning and Development does not intend to supersede Subpart C of Part 35 for the

Urban Homesteading program. The Urban Homesteading program transfers HUD, Veterans Administration (VA), and Farmers Home Administration (FmHA) owned properties at no cost to states or local government for use in a HUD-approved homesteading program. Unoccupied, unrepaid single family houses are then conditionally conveyed to homesteaders selected by the participating localities. Section 810 of the Housing and Community Development Act of 1974, as amended, requires that the locality give special consideration to the applicant's need for housing and ability to make the repairs or to pay for them to be made. Priority is given to applicants whose housing fails to meet local health and safety standards and who currently pay over 30 percent of their income for shelter. No funds are authorized in the statute for rehabilitation. These repairs are often funded through the Section 312 program, CDBG, or by private lenders. Section 810 funds may only be used to reimburse the FHA, VA or FmHA portfolio account for the purchase of these properties. An amendment to the enabling legislation would be required if Section 810 funds were to be used for lead-based paint abatement or any other purpose.

New regulations, issued for the Urban Homesteading program on June 24, 1985 (50 FR 25941), included a provision to comply with lead-based paint procedures. 24 CFR 590.11(d)(6). This proposed rule revises the Urban Homesteading program at 24 CFR 590.11(d)(6) to incorporate by reference Part 35.

#### **V. Section by Section Review of Proposed Regulations**

The proposed regulations amend Parts 35, 510, 511, 570 and 590. Each of these amendments are described below.

##### *Part 35*

The definition of HUD-associated housing in Section 35.3 is revised. Section 35.5 is revised to provide superseding authority for program-specific notification requirements. Section 35.24 of Subpart C is repeated as it was proposed in the Housing rule (July 1, 1986, 51 FR 24112) and is discussed extensively above in Section IV.

##### *Part 510*

Section 510.410 is proposed to be amended. This section was discussed in detail in Section IV.

##### *Part 511*

Section 511.11(f) is proposed to be amended. This section was discussed in detail in Section IV.

##### *Part 570*

Sections 570.458, 570.461 and 570.608 are proposed to be amended. These sections were discussed in detail in Section IV.D.2 and 3.

##### *Part 590*

Section 590.11 is proposed to be amended to incorporate by reference the lead-based paint regulations in Part 35. This section is discussed above in detail in Section IV.E.

#### **Other Matters**

##### *Regulatory Flexibility Act*

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. HUD finds that there are not anticompetitive discriminatory aspects of the proposed rule with regard to small entities nor are there any unusual procedures that would need to be complied with by small entities.

##### *Environmental Impact*

A Finding of No Significant Impact with respect to the environment has been made in accordance with Part 50 of this title, which implements section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, DC 20510.

##### *OMB Control Number*

The information collection requirements contained in §§ 510.410(c)(2)(ii), (6) and (8); 511.11(f)(3)(ii)(B), (vi) and (viii); and 570.608(c)(3)(ii), (7) and (9) of this proposed rule have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3502). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

##### *Regulatory Impact Analysis*

This rule qualifies as a major rule as defined in Executive Order 12291. The Department is conducting a cost analysis of the proposed regulations. Once completed, this cost analysis will serve as a Regulatory Impact Analysis.



The Department interprets the Executive Order to require, in this case, an analysis of potential costs and the cost alternatives without regard to the degree to which cost-effectiveness is an appropriate standard under the applicable statute. The cost study will be available for the final rulemaking.

#### *Semiannual Agenda of Regulations*

This rule was listed as sequence number 793 under the Office of the Secretary in the Department's Semiannual Agenda of Regulations published on April 21, 1986 (51 FR 14036, 14046) under Executive Order 12291 and the Regulatory Flexibility Act.

#### **Note**

The following HUD rule is subject to regulatory review by the Director of the Office of Management and Budget under Executive Order 12291, February 17, 1981.

While the cited rules have been submitted to the OMB for review under the Executive Order, that review has not been completed at the time of this publication. It is impracticable for the Department of Housing and Urban Development to follow the procedures of the Executive Order with respect to these rules, because, under orders filed by the United States District Court for the District of Columbia in *Ashton v. Pierce*, Civil Action No. 81-0719 (December 13, 1985 and February 7, 1986), the Department has been directed to publish these rules on or before August 1, 1986.

The Department has to date, and will continue, to adhere to the requirements of Executive Order 12291 to the extent permitted by the judicial deadline.

#### **List of Subjects**

##### *24 CFR Part 35*

Lead poisoning, Reporting and recordkeeping requirements.

##### *24 CFR Part 510*

Loan programs: Housing and community development, Housing, Relocation assistance, Home improvement, Rehabilitation, Urban renewal.

##### *24 CFR Part 511*

Rental rehabilitation grants, Administrative practice and procedure, Grant programs: Housing and community development, Low and moderate income housing, Reporting and recordkeeping requirements.

##### *24 CFR Part 570*

Community development block grants, Grant programs: Housing and community development, Loan

programs: Housing and community development, Low and moderate income housing, New communities, Pockets of poverty, Small cities.

##### *24 CFR Part 590*

Government property, Homesteading, Housing, Intergovernmental relations, Loan programs: Housing and community development.

Accordingly, 24 CFR Parts 35, 510, 511, 570 and 590 would be amended as follows:

#### **PART 35—LEAD-BASED PAINT POISONING PREVENTION IN CERTAIN RESIDENTIAL STRUCTURES**

##### **Subpart A—Notification to Purchasers and Tenants of HUD-Associated Housing Constructed Prior to 1978 of the Hazards of Lead-Based Paint Poisoning**

1. The authority citation of Part 35 would be revised to read as set forth below.

**Authority:** Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. The definition of HUD-associated housing in § 35.3(e) would be revised to read as follows:

##### **§ 35.3 Definitions.**

(e) *HUD-associated housing.* Any residential structure that is the subject of an application for mortgage insurance under the National Housing Act or is proposed for the receipt of housing assistance payments under a program administered by the Secretary. For purposes of this Subpart A, "HUD-associated housing" also includes any existing residential structure—

(1) Acquired by the Secretary pursuant to any provision of law which, prior to such acquisition, was insured under the National Housing Act or was subject to a loan under section 312 of the Housing Act of 1964,

(2) Sold by the Secretary following any such acquisition and subject to any requirements regarding its use or operation under an agreement with, or condition imposed by, the Secretary, or

(3) That is currently covered by mortgage insurance or a contract for housing assistance payments.

3. Section 35.5 would be revised to read as follows:

##### **§ 35.5 Requirements.**

(a) Purchasers and tenants of HUD-associated housing constructed prior to 1978 shall be notified: (1) That the

property was constructed prior to 1978; (2) that the property may contain lead-based paint; (3) of the hazards of lead-based paint; (4) of the symptoms and treatment of lead-based paint poisoning; and (5) of the precautions to be taken to avoid lead-based paint poisoning (including maintenance and removal techniques for eliminating such hazards).

Prospective purchasers or renters shall receive the above notifications prior to purchase or rental.

(b) Each Assistant Secretary shall take necessary actions to implement the requirements of paragraph (a) of this section with respect to the HUD programs within his/her administrative jurisdiction. Such actions shall include the preparation and prescription of appropriate notices or brochures providing the required information, and the establishment of procedures to: (1) Provide evidence that the prescribed notification has been received by purchasers and tenants of HUD-associated housing constructed prior to 1978, and (2) require the inclusion of appropriate provisions in contracts of sale, rental or management of HUD-associated housing to assure that purchasers and tenants receive the prescribed notification.

(c) Any requirement of this section shall be deemed superseded by a regulation promulgated by an Assistant Secretary with respect to any program under his or her jurisdiction which states expressly that it is promulgated pursuant to the authorization granted in this section and supersedes, with respect to programs within its defined scope, the notification requirements prescribed by this section. See, e.g., 24 CFR 570.608(b) (Community Development Block Grant).

##### **Subpart C—Elimination of Lead-Based Paint Hazards in HUD-Associated Housing**

4. Section 35.24 would be revised to read as follows (alternative versions of paragraphs (b)(1) and (2) are shown enclosed in brackets):

##### **§ 35.24 Requirements**

(a) Each Assistant Secretary shall establish procedures with respect to programs involving HUD-associated housing within his or her administrative jurisdiction to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to such housing which may present such hazards.

(b) Subject to the provisions of separate regulations promulgated with



respect to any program by the Assistant Secretary having jurisdiction over such program, the following minimum requirements shall apply to all programs:

*[Alternative A:]*

(1) All applicable surfaces of HUD-associated housing constructed prior to 1978 shall be inspected to determine whether defective paint surfaces exist. In housing proposed to be assisted with Housing Development Grant funds, the unit of local government or appropriate agency thereof shall be responsible for inspection.

(2) Treatment necessary to eliminate immediate hazards shall, at a minimum consist of covering or removal of defective paint surfaces found in HUD-associated housing constructed prior to 1978. Covering may be accomplished by such means as adding a layer of gypsum wallboard or a fiberglass cloth barrier to the wall surface. Depending on the wall condition, wallpaper (which is permanently attached and not easily strippable) may be used. Covering or replacing trim surfaces is also permitted. Paint removal may be accomplished by such methods as scraping, heat treatment (infra-red or coil type heat guns) or chemicals. Sanding and use of propane torches are not permitted. Washing and repainting without thorough removal or covering does not constitute adequate treatment.]

*[Alternative B:]*

(1) All applicable surfaces of HUD-associated housing constructed prior to 1950 shall be inspected to determine whether defective paint surfaces exist. In housing proposed to be assisted with Housing Development Grant funds, the unit of local government or appropriate agency thereof shall be responsible for inspection.

(2) Treatment necessary to eliminate immediate hazards shall, at a minimum, consist of covering or removal of defective paint surfaces found in HUD-associated housing constructed prior to 1950. Covering may be accomplished by such means as adding a layer of gypsum wallboard or a fiberglass cloth barrier to the wall surface. Depending on the wall condition, wallpaper (which is permanently attached and not easily strippable) may be used. Covering or replacing trim surfaces is also permitted. Paint removal may be accomplished by such methods as scraping, heat treatment (infra-red or coil type heat guns) or chemicals. Sanding and use of propane torches are not permitted. Washing and repainting without thorough removal or covering does not constitute adequate treatment.]

(3) Appropriate provisions for the inspection of applicable surfaces and elimination of hazards shall be included in contracts and subcontracts involving HUD-associated housing to which such requirements may apply.

(4) Any requirement of this section shall be deemed superseded by a regulation promulgated by an Assistant Secretary with respect to any program under his or her jurisdiction which states expressly that it is promulgated pursuant to the authorization granted in this section and supersedes, with respect to programs within its defined scope, the requirement prescribed by this section. See e.g., 24 CFR Part 200, Subpart O (mortgage insurance and property disposition); § 882.109(i) (Section 8 Existing Housing); Part 965, Subpart H (Public and Indian Housing).

#### **PART 510—SECTION 312 REHABILITATION LOAN PROGRAM**

5. The citation of authority for Part 510 continues to read as follows:

**Authority:** Sec. 312, United States Housing Act of 1964 (42 U.S.C. 1452b); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

6. Section 510.410 would be added to read as follows (in § 510.410(c)(2), alternative versions of paragraph (i) are shown enclosed in brackets):

#### **§ 510.410 Lead-based paint.**

(a) *Prohibition against the use of lead-based paint.* section 401(b) of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4831(b)) directs the Secretary to prohibit the use of lead-based paint in residential structures rehabilitated with Federal assistance in any form. Such prohibitions are contained in 24 CFR Part 35, Subpart B, and are applicable to residential structures rehabilitated with assistance provided under this part.

(b) *Notification of hazards of lead-based paint poisoning.* (1) The Secretary has promulgated requirements regarding notification to purchasers and tenants of HUD-associated housing constructed prior to 1978 of the hazards of lead-based paint poisoning at 24 CFR Part 35, Subpart A. This paragraph is promulgated pursuant to the authorization granted in 24 CFR 35.5(c) and supersedes, with respect to all housing to which it applies, the notification requirements prescribed by Subpart A of 24 CFR 35.

(2) For properties constructed prior to 1978, owner-occupant applicants for rehabilitation assistance provided under this part shall be notified: (i) That the property may contain lead-based paint; (ii) of the hazards of lead-based paint; (iii) of the symptoms and treatment of

lead-based paint poisoning; (iv) of the precautions to be taken to avoid lead-based paint poisoning (including maintenance and removal techniques for eliminating such hazards) and (v) of the advisability and availability of blood lead level screening for children under seven years of age.

Owners of investment properties receiving rehabilitation assistance under this part shall provide the same notification as described above to their tenants.

(c) *Elimination of lead-based paint hazards.* The purpose of this paragraph is to implement the provisions of section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4822, by establishing procedures to eliminate as far as practicable the hazards due to the presence of paint which may contain lead and to which children under seven years of age may be exposed in existing housing which is rehabilitated with assistance provided under this part. The Secretary has promulgated requirements regarding the elimination of lead-based paint hazards in HUD-associated housing at 24 CFR Part 35, Subpart C. This paragraph is promulgated pursuant to the authorization granted in 24 CFR 35.24(b)(4) and supersedes, with respect to all housing to which it applies, the requirements prescribed by Subpart C of 24 CFR Part 35. These requirements shall be implemented not later than [six months after effective date of rule].

#### **(1) Definitions.**

**Applicable surface.** All exterior surfaces of a residential structure, up to five feet from the floor or ground, such as a wall, stairs, deck, porch, railing, window or doors, which are readily accessible to children under seven years of age, and all interior surfaces of a residential structure.

**Chewable surface.** All chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodwork.

**Defective paint surface.** Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

**Elevated blood lead level or EBL.** Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 ug/dl (micrograms of lead per deciliter of whole blood) or greater.

**Lead-based paint.** A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1 mg/cm<sup>2</sup>.

#### **(2) Inspection and testing.**



**[Alternative A:]**

(i) *Defective paint surfaces.* The local agency shall inspect for defective paint surfaces in all units constructed prior to 1978 which are occupied by families with children under seven years of age and which are proposed for rehabilitation assistance. The inspection shall occur at the same time the property is being inspected for rehabilitation. Defective paint conditions will be included in the work write-up for the remainder of the rehabilitation work.]

**[Alternative B:]**

(i) *Defective paint surfaces.* The local agency shall inspect for defective paint surfaces in all units constructed prior to 1950 which are occupied by families with children under seven years of age and which are proposed for rehabilitation assistance. The inspection shall occur at the same time the property is being inspected for rehabilitation. Defective paint conditions will be included in the work write-up for the remainder of the rehabilitation work.]

(ii) *Chewable surfaces.* The local agency shall be required to test the lead content of chewable surfaces if the family residing in a unit, constructed prior to 1950 and receiving rehabilitation assistance, includes a child under seven years of age with an identified EBL condition. Lead content shall be tested by using an X-ray fluorescence analyzer (XRF) or other method approved by HUD. Test readings of 1 mg/cm<sup>2</sup> or higher using an XRF shall be considered positive for presence of lead-based paint.

(3) *Abatement actions.* (i) For inspections performed under § 510.410(c)(2)(i) and where defective paint surfaces are found, treatment shall be provided to defective areas. Treatment shall be performed before final inspection and approval of the work.

(ii) For testing performed under § 510.410(c)(2)(ii) and where chewable surfaces are found to contain lead-based paint, the entire interior and exterior chewable surfaces shall be treated. Treatment shall be performed before final inspection and approval of the work.

(iii) When weather prohibits repainting exterior surfaces before final inspection, the local agency may permit the owner to abate the defective paint or chewable lead-based paint as required by this section and agree to repaint by a specified date. A separate inspection would be required.

(4) *Abatement methods.* At a minimum, treatment of the defective areas and chewable lead-based paint surfaces shall consist of covering or removal of the painted surface as described in 24 CFR 35.24(b)(2).

(5) *Funding.* (i) *Inspection and testing.* The local agency shall bear the costs of inspections and testing required by § 510.410(c)(2).

(ii) *Abatement.* Program requirements and local program design will determine whether the cost of abatement is to be borne by the owner/occupant or investor owner, the local agency or a combination of the owner/occupant or investor owner and local agency.

(6) *Certifications.* The local agency shall be required to certify that inspections and tests for lead-based paint of housing units are in compliance with § 510.410(c)(2).

(7) *Tenant protection.* The loan recipient shall take appropriate action to protect tenants from hazards associated with abatement procedures and will notify the grantee of those actions taken.

(8) *Records.* The local agency shall keep a copy of each inspection and/or test report for at least three years.

(9) *Monitoring and enforcement.* HUD field office monitoring of rehabilitation programs will cover compliance with applicable program requirements for lead-based paint. In cases of noncompliance, HUD may impose conditions or sanctions on grantees to encourage prompt compliance.

(10) *Compliance with other program requirements, Federal, state and local laws.* (i) *Other program requirements.* To the extent that assistance from any of the programs covered by this section is used in conjunction with other HUD program assistance which have lead-based paint requirements which may have more or less stringent requirements, the more stringent requirements shall prevail.

(ii) *HUD responsibility.* If HUD determines that a state or local law, ordinance, code or regulation provides for lead-based paint testing or hazard abatement in a manner which provides a comparable level of protection from the hazards of lead-based paint poisoning to that provided by the requirements of this section and that adherence to the requirements of this subpart would be duplicative or otherwise cause inefficiencies, HUD may modify or waive the requirements of this section in such manner as may be appropriate to promote efficiency while ensuring such comparable level of protection.

(iii) *Loan recipient/local agency responsibility.* Nothing in this section is intended to relieve any loan recipient/

local agency in the programs covered by this section of any responsibility for compliance with state or local laws, ordinances, codes or regulations governing lead-based paint testing or hazard abatement.

(iv) *Disposal of lead-based paint debris.* Lead-based paint and defective paint debris shall be disposed of in accordance with applicable Federal, state or local requirements. (See, e.g., 40 CFR Parts 260-271.)

## **PART 511—RENTAL REHABILITATION GRANT PROGRAM**

7. The citation of authority for Part 511 continues to read as follows:

**Authority:** Sec. 17 of the United States Housing Act of 1937 (42 U.S.C. 1437o); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

8. Section 511.11(f) would be revised to read as follows (in §511.11(f)(3)(ii), alternative revisions of paragraph (A) are shown enclosed in brackets):

### **§511.11 Other Federal requirements.**

\* \* \* \* \*

(f) *Lead-based paint.* (1) *Prohibition against the use of lead-based paint.* section 401(b) of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4831(b)) directs the Secretary to prohibit the use of lead-based paint in residential structures rehabilitated with Federal assistance in any form. Such prohibitions are contained in 24 CFR Part 35, Subpart B, and are applicable to residential structures rehabilitated with assistance provided under this part.

(2) *Notification of hazards of lead-based paint poisoning.* (i) The Secretary has promulgated requirements regarding notification to purchasers and tenants of HUD-associated housing constructed prior to 1978 of the hazards of lead-based paint poisoning at 24 CFR Part 35, Subpart A. This paragraph is promulgated pursuant to the authorization granted in 24 CFR 35.5(c) and supersedes, with respect to all housing to which it applies, the notification requirements prescribed by Subpart A of 24 CFR Part 35.

(ii) For properties constructed prior to 1978, owner-occupant applicants for rehabilitation assistance provided under this part and tenants of properties rehabilitated with assistance provided under this part shall be notified: (A) That the property may contain lead-based paint; (B) of the hazards of lead-based paint; (C) of the symptoms and treatment of lead-based paint poisoning; (D) of the precautions to be taken to avoid lead-based paint poisoning (including maintenance and removal



techniques for eliminating such hazards) and (E) of the advisability and availability of blood lead level screening for children under seven years of age.

(3) *Elimination of lead-based paint hazards.* The purpose of this paragraph is to implement the provisions of section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4822, by establishing procedures to eliminate as far as practicable the hazards due to the presence of paint which may contain lead and to which children under seven years of age may be exposed in existing housing which is rehabilitated with assistance provided under this part. The Secretary has promulgated requirements regarding the elimination of lead-based paint hazards in HUD-associated housing at 24 CFR Part 35, Subpart C. This paragraph is promulgated pursuant to the authorization granted in 24 CFR 35.24(b)(4) and supersedes, with respect to all housing to which it applies, the requirements prescribed by Subpart C of 24 CFR Part 35. These requirements shall be implemented not later than [six months after effective date of rule].

(i) *Definitions.*

*Applicable surface.* All exterior surfaces of a residential structure, up to five feet from the floor or ground, such as a wall, stairs, deck, porch, railing, window, or doors, which are readily accessible to children under seven years of age, and all interior surfaces of a residential structure.

*Chewable surface.* All chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frame, doors, and frames, and other protruding woodwork.

*Defective paint surface.* Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

*Elevated blood lead level or EBL.* Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 ug/dl (micrograms of lead per deciliter of whole blood) or greater.

*Grantee.* The direct formula grantee or recipient of funds under the state program.

*Lead-based paint.* A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1 mg/cm<sup>2</sup>.

(ii) *Inspection and testing.*

[Alternative A:

(A) *Defective paint surfaces.* The grantee shall inspect for defective paint surfaces in all units constructed prior to 1978 which are occupied by families with children under seven years of age

and which are proposed for rehabilitation assistance. The inspection shall occur at the same time the property is being inspected for rehabilitation. Defective paint conditions will be included in the work write-up for the remainder of the rehabilitation work.]

[Alternative B:

(A) *Defective paint surfaces.* The grantee shall inspect for defective paint surfaces in all units constructed prior to 1950 which are occupied by families with children under seven years of age and which are proposed for rehabilitation assistance. The inspection shall occur at the same time the property is being inspected for rehabilitation. Defective paint conditions will be included in the work write-up for the remainder of the rehabilitation work.]

(B) *Chewable surfaces.* The grantee shall be required to test the lead content of chewable surfaces if the family residing in a unit, constructed prior to 1950 and receiving rehabilitation assistance, includes a child under seven years of age with an identified EBL condition. Lead content shall be tested by using an X-ray fluorescence analyzer (XRF) or other method approved by HUD. Test readings of 1 mg/cm<sup>2</sup> or higher using an XRF shall be considered positive for presence of lead-based paint.

(iii) *Abatement actions.*

(A) For inspections performed under § 511.11(f)(3)(ii)(A) and where defective paint surfaces are found, treatment shall be provided to defective areas. Treatment shall be performed before final inspection and approval of the work.

(B) For testing performed under § 511.11(f)(3)(ii)(B) and where chewable surfaces are found to contain lead-based paint, the entire interior and exterior chewable surfaces shall be treated. Treatment shall be performed before final inspection and approval of the work.

(C) When weather prohibits repainting exterior surfaces before final inspection, the grantee, may permit the owner to abate the defective paint or chewable lead-based paint as required by this section and agree to repaint by a specified date. A separate inspection would be required.

(iv) *Abatement methods.* At a minimum, treatment of the defective areas and chewable lead-based paint surfaces shall consist of covering or removal of the painted surface as described in 24 CFR 35.24(b)(2).

(v) *Funding.*

(A) *Inspection and testing.* The grantee shall bear the costs of inspections and testing required by § 511.11(f)(3)(ii).

(B) *Abatement.* Program requirements and local program design will determine whether the cost of the abatement is to be borne by the owner/developer, the grantee or a combination of the owner/developer and the grantee.

(vi) *Certifications.* The grantee shall be required to certify that inspections and tests for lead-based paint of housing units are in compliance with § 511.11(f)(3)(ii).

(vii) *Tenant protection.* The owner shall take appropriate action to protect tenants from hazards associated with abatement procedures and will notify the grantee of such actions taken.

(viii) *Records.* The grantee shall keep a copy of each inspection and/or test report for at least three years.

(ix) *Monitoring and enforcement.* HUD field office monitoring of rehabilitation programs will cover compliance with applicable program requirements for lead-based paint. In cases on noncompliance, HUD may impose conditions or sanctions on grantees to encourage prompt compliance.

(x) *Compliance with other program requirements, Federal, state and local laws.*

(A) *Other program requirements.* To the extent that assistance from any of the programs covered by this section is used in conjunction with other HUD program assistance which have lead-based paint requirements which may have more or less stringent requirements, the more stringent requirements shall prevail.

(B) *HUD responsibility.* If HUD determines that a state or local law, ordinance, code or regulation provides for lead-based paint testing or hazard abatement in a manner which provides a comparable level of protection from the hazards of lead-based paint poisoning to that provided by the requirements of this section and that adherence to the requirements of this subpart would be duplicative or otherwise cause inefficiencies, HUD may modify or waive the requirements of this section in such manner as may be appropriate to promote efficiency while ensuring such comparable level of protection.

(C) *Grantee responsibility.* Nothing in this section is intended to relieve any grantee in the programs covered by this section of any responsibility for compliance with state or local laws, ordinances, codes or regulations



governing lead-based paint testing or hazard abatement.

(D) *Disposal of lead-based paint debris.* Lead-based paint and defective paint debris shall be disposed of in accordance with applicable Federal, state or local requirements. (See, e.g., 40 CFR Parts 260-271.)

## PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

### Subpart G—Urban Development Action Grants

9. The citation of authority for Part 570 continues to read as follows:

*Authority:* Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301-5320); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

10. Section 570.458 would be amended by adding paragraph (c)(14)(ix)(N) to read as follows:

#### § 570.458 Full applications.

- (c) \* \* \*
- (14) \* \* \*
- (ix) \* \* \*

(N) The lead-based paint regulations as set forth in 24 CFR Part 35 as modified by § 570.608 of Subpart K and certify that it will require the participating party obligated to carry out the rehabilitation activities to comply with the requirements in § 570.608 of Subpart K.

11. Section 570.461 would be amended by adding the concluding text at the end of the section to paragraph (f) and by adding paragraph (g) to read as follows:

#### § 570.461 Post preliminary approval requirements.

(g) *Lead-based paint requirements.* The recipient may receive preliminary approval prior to the accomplishment of inspection, testing, notification and abatement as described in § 570.608 of Subpart K, but no funds will be released until such actions are complete and evidence of compliance is submitted to HUD.

## PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

### Subpart K—Other Program Requirements

12. Section 570.608 would be revised to read as follows (in § 570.608(c)(2), alternative revisions of paragraph (i) are shown enclosed in brackets):

#### § 570.608 Lead-based paint.

(a) *Prohibition against the use of lead-based paint.* Section 401(b) of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4831(b)) directs the Secretary to prohibit the use of lead-based paint in residential structures constructed or rehabilitated with Federal assistance in any form. Such prohibitions are contained in 24 CFR Part 35, Subpart B, and are applicable to residential structures constructed or rehabilitated with assistance provided under this part.

(b) *Notification of hazards of lead-based paint poisoning.* (1) The Secretary has promulgated requirements regarding notification to purchasers and tenants of HUD-associated housing constructed prior to 1978 of the hazards of lead-based paint poisoning at 24 CFR Part 35, Subpart A. This paragraph is promulgated pursuant to the authorization granted in 24 CFR 35.5(c) and supersedes, with respect to all housing to which it applies, the notification requirements prescribed by Subpart A of 24 CFR Part 35.

(2) For properties constructed prior to 1978, owner-occupant applicants for rehabilitation assistance provided under this part and purchasers of publicly-owned properties rehabilitated with assistance provided under this part shall be notified: (i) That the property may contain lead-based paint; (ii) of the hazards of lead-based paint; (iii) of the symptoms and treatment of lead-based paint poisoning; (iv) of the precautions to be taken to avoid lead-based poisoning (including maintenance and removal techniques for eliminating such hazards) and (v) of the advisability and availability of blood lead level screening for children under seven years of age.

(c) *Elimination of lead-based paint hazards.* The purpose of this paragraph is to implement the provisions of section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4822, by establishing procedures to eliminate as far as practicable the hazards due to the presence of paint which may contain lead and to which children under seven years of age may be exposed in existing housing which is rehabilitated with assistance provided under this part. The Secretary has promulgated requirements regarding the elimination of lead-based paint hazards in HUD-associated housing at 24 CFR Part 35, Subpart C. This paragraph is promulgated pursuant to the authorization granted in 24 CFR 35.24(b)(4) and supersedes, with respect to all housing to which it applies, the requirements prescribed by Subpart C of 24 CFR Part 35. These requirements shall be implemented not later than [six months after effective date of rule].

(1) *Applicability.* This paragraph applies to the rehabilitation of applicable surfaces in existing housing which is assisted under this part. The following activities assisted under the Community Development Block grant program are not covered by this paragraph: (i) Emergency repairs (not including lead-based paint-related emergency repairs); (ii) weatherization; (iii) water or sewer hook-ups; (iv) installation of security devices; (v) facilitation of tax exempt bond issuances which provide funds for rehabilitation; (vi) other similar types of single-purpose programs that do not include physical repairs or remodeling of applicable surfaces (as defined in § 35.22) of residential structures; and (vii) any non-single purpose rehabilitation that does not involve applicable surfaces (as defined in § 35.22) that does not exceed \$3,000 per unit.

#### (2) Definitions.

*Applicable surface.* All exterior surfaces of a residential structure, up to five feet from the floor or ground, such as a wall, stairs, deck, porch, railing, window, or doors, which are readily accessible to children under seven years of age, and all interior surfaces of a residential structure.

*Chewable surface.* All chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodwork.

*Defective paint surface.* Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

*Elevated blood lead level or EBL.* Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 ug/dl (micrograms of lead per deciliter of whole blood) or greater.

*Lead-based paint.* A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1 mg/cm<sup>2</sup>.

#### (3) Inspection and testing.

##### [Alternative A:

(i) *Defective paint surfaces.* The grantee shall inspect for defective paint surfaces in all units constructed prior to 1978 which are occupied by families with children under seven years of age and which are proposed for rehabilitation assistance. The inspection shall occur at the same time the property is being inspected for rehabilitation. Defective paint conditions will be included in the work



write-up for the remainder of the rehabilitation work.]

*[Alternative B:*

(i) *Defective paint surfaces.* The grantee shall inspect for defective paint surfaces in all units constructed prior to 1950 which are occupied by families with children under seven years of age and which are proposed for rehabilitation assistance. The inspection shall occur at the same time the property is being inspected for rehabilitation. Defective paint conditions will be included in the work write-up for the remainder of the rehabilitation work.]

(ii) *Chewable surfaces.* The grantee shall be required to test the lead content of chewable surfaces if the family residing in a unit, constructed prior to 1950 and receiving rehabilitation assistance, includes a child under seven years of age with an identified EBL condition. Lead content shall be tested by using an X-ray fluorescence analyzer (XRF) or other method approved by HUD. Test reading of 1 mg/cm<sup>2</sup> or higher using an XRF shall be considered positive for presence of lead-based paint.

(4) *Abatement actions.*

(i) For inspections performed under § 570.608(c)(3)(i) and where defective paint surfaces are found, treatment shall be provided to defective areas. Treatment shall be performed before final inspection and approval of the work.

(ii) For testing performed under § 570.608(c)(3)(ii) and where chewable surfaces are found to contain lead-based paint, the entire interior and exterior chewable surfaces shall be treated. Treatment shall be performed before final inspection and approval of the work.

(iii) When weather prohibits repainting exterior surfaces before final inspection, the grantee, may permit the owner to abate the defective paint or chewable lead-based paint as required by this section and agree to repaint by a specified date. A separate inspection would be required.

(5) *Abatement methods.* At a minimum, treatment of the defective

areas and chewable lead-based paint surfaces shall consist of covering or removal of the painted surface as described in 24 CFR 35.24(b)(2).

(6) *Funding.*

(i) *Inspection and testing.* The grantee shall bear the costs of inspections and testing required by § 570.608(c)(3). Testing for lead content on chewable surfaces, including the costs of purchasing any available equipment such as XRFs, shall be eligible costs under the CDBG program.

(ii) *Abatement.* Program requirements and local program design will determine whether the cost of the abatement is to be borne by the owner/developer, the grantee or a combination of the owner/developer and the grantee. The cost of abatement will be considered an eligible cost under the CDBG program.

(7) *Certifications.* The grantee shall be required to certify that inspections and tests for lead-based paint of housing units are in compliance with § 570.608(c)(3).

(8) *Tenant protection.* The owner/developer shall take appropriate action to protect tenants from hazards associated with abatement procedures and will notify the grantee of such actions taken.

(9) *Records.* The grantee shall keep a copy of each inspection and/or test report for at least three years.

(10) *Monitoring and enforcement.* HUD field office monitoring of rehabilitation programs will cover compliance with applicable program requirements for lead-based paint. In cases of noncompliance, HUD may impose conditions or sanctions on grantees to encourage prompt compliance.

(11) *Compliance with other program requirements, Federal, state and local laws.*

(i) *Other program requirements.* To the extent that assistance from any of the programs covered by this section is used in conjunction with other HUD program assistance which have lead-based paint requirements which may have more or less stringent requirements, the more stringent requirements shall prevail.

(ii) *HUD responsibility.* If HUD determines that a state or local law, ordinance, code or regulation provides for lead-based paint testing or hazard abatement in a manner which provides a comparable level of protection from the hazards of lead-based paint poisoning to that provided by the requirements of this section and that adherence to the requirements of this subpart would be duplicative or otherwise cause inefficiencies, HUD may modify or waive the requirements of this section in such manner as may be appropriate to promote efficiency while ensuring such comparable level of protection.

(iii) *Grantee responsibility.* Nothing in this section is intended to relieve any grantee in the programs covered by this section of any responsibility for compliance with state or local laws, ordinances, codes or regulations governing lead-based paint testing or hazard abatement.

(iv) *Disposal of lead-based paint debris.* Lead-based paint and defective paint debris shall be disposed of in accordance with applicable Federal, state or local requirements. (See, e.g., 40 CFR Parts 260-271.)

## PART 590—URBAN HOMESTEADING

13. The citation of authority for Part 590 continues to read as follows:

*Authority:* Sec. 810 of the Housing and Community Development Act of 1974 (12 U.S.C. 1706e); sec. 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

14. Section 590.11(d)(6) would be revised to read as follows:

### § 590.11 Applications.

\* \* \* \* \*

(d) \* \* \*

(6) The applicant or its designated public agency will comply with the HUD lead-based paint procedures set forth in 24 CFR Part 35.

\* \* \* \* \*

Dated: July 30, 1986.

Samuel R. Pierce, Jr.,  
Secretary.

[FR Doc. 86-17470 Filed 7-31-86; 8:45 am]

BILLING CODE 4210-32-M







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Federal Register

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Friday, August 1, 1986

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### LIST OF PUBLIC LAWS

Last List July 16, 1986

This is a continuing list of public bills from the current session of Congress which have become Federal laws.

The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).

#### S.J. Res. 274/Pub. L. 99-364

To designate the weekend of August 1, 1986, through August 3, 1986, as "National Family Reunion Weekend." (July 29, 1986; 100 Stat. 771; 1 page) Price: \$1.00

#### S.J. Res. 279/Pub. L. 99-365

To designate the month of October 1986, as "Lupus Awareness Month." (July 29, 1986; 100 Stat. 772; 1 page) Price: \$1.00

27515-27810.....1



## TABLE OF EFFECTIVE DATES AND TIME PERIODS—AUGUST 1986

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these

dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
August 1	August 18	September 2	September 15	September 30	October 30
August 4	August 19	September 3	September 18	October 3	November 3
August 5	August 20	September 4	September 19	October 6	November 3
August 6	August 21	September 5	September 22	October 6	November 4
August 7	August 22	September 8	September 22	October 6	November 5
August 8	August 25	September 8	September 22	October 7	November 6
August 11	August 26	September 10	September 25	October 10	November 10
August 12	August 27	September 11	September 26	October 14	November 10
August 13	August 28	September 12	September 29	October 14	November 12
August 14	August 29	September 15	September 29	October 14	November 12
August 15	September 2	September 15	September 29	October 14	November 13
August 18	September 2	September 17	October 2	October 17	November 17
August 19	September 3	September 18	October 3	October 20	November 17
August 20	September 4	September 19	October 6	October 20	November 18
August 21	September 5	September 22	October 6	October 20	November 19
August 22	September 8	September 22	October 6	October 21	November 20
August 25	September 9	September 24	October 9	October 24	November 24
August 26	September 10	September 25	October 10	October 27	November 24
August 27	September 11	September 26	October 14	October 27	November 25
August 28	September 12	September 29	October 14	October 27	November 26
August 29	September 15	September 29	October 14	October 28	November 28



# MEMORANDUM FOR THE RECORD

Subject: [Illegible]  
 Date: [Illegible]

DATE	TIME	DESCRIPTION
October 20	10:00 AM	[Illegible]
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